CASE No. 14,467.

EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1014.

H. P. LLOYD, ASSIGNEE OF E. L. HARPER, PLAINTIFF IN ERROR,

vs.

HATTIE A. MATTHEWS AND J. H. OTTEN.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

RECORD FILED JANUARY 29, 1891.

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INDEX.

	Page.
Transcript from Campbell chancery court	1
Order making Matthews and Otten parties	1
Petition to be made parties	1
Order filing pleadings, &c.	2
Note as to exhibit	2
Amended answer and cross petition of Matthews and Otten	3
Exhibit C—Note of Harper to Matthews, August 8, 1881	4
Reply and answer of Lloyd, trustee	4
Order on motion to set aside order of January 11, 1888, &c.	7
Order filing motion, &c.	7
Motion to strike depositions, &c.	8
Amended answer, &c., of Lloyd, trustee	8
Order filing exceptions	10
Exceptions to depositions	10
Order submitting exceptions, &c.	12

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Page.
Order filing reply of Matthews 12
Reply of Matthews 12
Order submitting motion, &c 13
Order on exceptions 13
Order submitting case 13
Amended answer of Lloyd, trustee 14
Judgment 14
Appeal to court of appeals 15
Hearing in court of appeals 15
Judgment of court of appeals 15

(Record, pages 2 to 28, incl.)

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STATE OF KENTUCKY:

Campbell Chancery Court.

Pleas before the Hon. J. W. Menzies, chancellor of the chancery court, at the court-house, in the city of Newport, Ky., on the 7th day of September, 1888.

ALBERT SILVA
vs.
FIDELITY NATIONAL BANK, &c. } = 3272. Consolidated Cases. In Equity.

Be it remembered that heretofore, to wit, on the 16th day of September, at the September term (1888) of the Campbell chancery court, the following order was made, to wit:

Came Hattie A. Matthews and J. H. Otten and filed their petition to be made party and they are made party defendants, and their petition is taken as their answer and cross-petition herein.

The petition to be made party, referred to in the foregoing order, is in words and figures as follows, to wit:

Campbell Chancery Court.

ALBERT SILVA, Pl'tff,
vs.
FIDELITY NATIONAL BANK, &c., Def'ts. } Petition of Hattie Matthews & J. H. Otten to be Made Parties.

The petitioners, Hattie A. Matthews and J. H. Otten, present this their petition to be parties defendant of the record herein for the following reasons, to wit:

Petitioners say that the defendant E. L. Harper, a short while before he executed the deed of assignment in the pleadings referred to, was the owner of 20 shares of stock in the Fidelity Building, Saving & Loan Company of Newport, Kentucky, of the full value of — dollars, which was evidenced by book of the said company No. 32, which is made an exhibit of this pleading.

Petitioners say further that the said E. L. Harper was a creditor of the petitioner Hattie A. Matthews in a sum equal to the full face value of the said building association stock.

Petitioners say that at the time of the said deed of assignment and theretofore and since the said defendant, E. L. Harper, was a citizen and resident of the State of Ohio, and by the laws in existence at that time in said State of Ohio debtors had the right to make preference in the payment of their creditors either in the deed of assignment or by paying them theretofore in such a way as they saw proper.

Petitioners say that on the day *of* the said deed of assignment

was made and executed in the State of Ohio, to wit, on the 27th day of June, 1887, several hours before the execution of said deed of assignment, the said E. L. Harper, defendant, executed and delivered in writing to the petitioner J. H. Otten all the said 20 shares of stock of said building association, with directions to him, the said J. H. Otten, to collect the proceeds of the said stock and pay the same to the petitioner Hattie A. Matthews.

Petitioners say that by the said transfer of assignment which is recorded in the said book that is made an exhibit to this pleading the petitioner Hattie A. Matthews became and is now the owner of the said stock of the proceeds thereon. Petitioners say further that plaintiffs in the consolidated cases herein, H. M. Healy, A. R. Bloomfield, Peter Schultz, and Albert Silva, in their said suits attached the said building association stock as the property of said defendant, E. L. Harper, and are severally asserting claim thereto in this case.

Petitioners say further H. P. Lloyd, assignee in the State of Ohio of the said E. L. Harper, has also been made a party to the defendant herein and claims the said stock as part of the assignment of the estate of the said E. L. Harper.

Petitioners say said transfer was *bona fide* and for valuable consideration and passed all interest of the said E. L. Harper thereto.

Petitioners now come and ask to be made parties defendant to this suit; that this pleading be taken as their answer and cross-petition; and pray further as against the said several plaintiffs who have attached the said stock, and also pray as against the said H. P. Lloyd, that the said stock in the said building association be adjudged the property of defendant Hattie A. Matthews; for costs and for all proper relief.

R. W. NELSON &
JNO. S. DUCKER,
Attorneys for Hattie A. Matthews and J. H. Otten.

CAMPBELL COUNTY, }
State of Kentucky. }

Petitioner Hattie A. Matthews says the statements of the foregoing pleadings are true as she verily believes.

HATTIE A. MATTHEWS.

Subscribed and sworn to before me by Hattie A. Matthews this 28th day of December, 1887.

GEO. LEONARD, *Ex. C. C. C.*

Thereafter, at the January term of the court, on the 14th day of January, 1888, the following order was made, to wit:

Came Hattie A. Matthews and filed exhibit to her petition to be made party, and Hattie A. Matthews and J. H. Otten filed joint amended answer and cross-petition, and Lloyd, trustee, filed reply and answer.

The exhibit to petition of Hattie A. Matthews does not appear

among the papers in this case. The joint amended answer and cross-petition referred to in the foregoing order is in words and figures as follows, to wit:

Campbell Chancery Court.

ALBERT SILVA, Pl't'ff,
vs.
FIDELITY NATIONAL BANK and CONSOLIDATED CASES, Def'ts.

Hattie A. Matthews and J. H. Otten, who have heretofore been made parties-defendant to these consolidated cases, and their petition filed to be made parties having been taken as their answer and cross-petition, now come and amend their said pleading and say that their codefendant E. L. Harper on the 8th day of August, 1881, agreed and promised to pay on demand to the defendant Hattie A. Matthews the sum of $5,000.00, with 8% interest from date until paid, and the interest was to be paid quarterly.

Plaintiff says the said contract was executed in Cincinnati, Ohio, where this defendant and the said E. L. Harper then resided, and by the laws of the said State of Ohio, then in existence, contracts for 8% interest for the use of money were legal, valid, binding, and obligatory.

Plaintiff says on the said note the interest was paid to January 1st, 1882, and on the — day of June, 1887, when the stock of said Fidelity Building, Saving and Loan Company was transferred to the defendant Hattie A. Matthews through the defendant J. H. Otten, there was due something over $7,000.00 on said debt. The defendants file herewith as part of said pleading the said original note hereinbefore described and mark it Exhibit "C."

Plaintiff says that at the time of the transfer of the said building association stock, in June, 1887, to the defendant Hattie A. Matthews, the assignment of which is also made part of this pleading, the said building association stock was worth $4,188.88 or thereabout, and that said Harper owes the defendant Hattie A. Matthews at least $3,000.00 yet on the said indebtedness after crediting said building association stock.

Wherefore the defendants makes this and their former pleading cross-petitions against all the plaintiffs herein and against defendant Lloyd, against defendant building association, and all other defendants, and pray as in their original pleading, the same filed on September 16th, 1887, for costs and for general relief.

JNO. S. DUCKER, *Att'y.*

CAMPBELL COUNTY, }
State of Kentucky. }

The defendant Hattie A. Matthews says the statements of the petition to be made party that was filed herein on the 16th day of September, 1887, by her and her codefendant, J. H. Otten, were true and the statements of the above pleading are true, as she verily believes.

HATTIE A. MATTHEWS.

Subscribed and sworn to before me by Hattie A. Matthews this 28th day of December, 1887.

GEO. LEONARD, *Ex. C. C.*

Exhibit "C," referred to in foregoing amended answer, &c., is in words and figures as follows, to wit:

$5,000.00. CINCINNATI, *Aug. 8th*, 1881.

On demand, after date, I promise to pay to the order of Miss Hattie A. Matthews five thousand dollars, value received, with 8% interest from date till paid; interest payable quarterly.

E. L. HARPER.

Endorsed: Interest paid on the within note Jan. 1st, 1882.

(Endorsed in pencil:)

"July 14, 1887, note & int.	7,188 88
20 shares Build. — Newport	4,188 88
Bal. due	3,000 00"

The reply and answer of Lloyd, trustee, referred to in foregoing order, is in words and figures as follows, to wit:

Campbell Chancery Court.

ALBERT SILVA, Plaintiff, *vs.* FIDELITY NATIONAL BANK, &c., Defendants.	Reply to Answer and Answer to Cross-Petition of Otten & Matthews in Consolidated Cases.

The defendant Harlan P. Lloyd, trustee of E. L. Harper, for reply to the answer and answer to the cross-petition of John Otten and Hattie A. Matthews in the consolidated cases herein, says that he admits that a short time before said E. L. Harper executed his deed of assignment to this defendant he, said Harper, was the owner of twenty shares of stock mentioned in the Fidelity Building, Savings and Loan Company of Newport, Kentucky, but he denies that said E. L. Harper was a creditor or debtor of the said Matthews in a sum equal to the face value of the said stock or in any other sum whatever at the time of the said assignment. He admits that at the time of the execution of his said deed of assignment said Harper was a citizen and resident of the State of Ohio; so was said Matthews. He denies that at the time of making said assignment that debtors had, by the laws of the State of Ohio, the right to prefer their creditors in the deed of assignment. Defendant admits that within a few hours before the execution of the deed of assignment the said Harper attempted, by an endorsement or pretended assignment in the pass book of said Harper evidencing his interest in said association, to transfer to said J. H. Otten the said shares in said association, but denies that he gave directions or any direction to said Otten to collect the proceeds of the said shares or to pay over, when collected, the *the* proceeds of said shares to said Matthews. He de-

nies that there was any consideration whatever to or for the said pretended assignment by said Harper to said Otten, or that by said transfer or assignment the said Matthews became or was or is now the owner of the said shares of stock or the proceeds thereof.

Defendant denies that said transfer of said shares of stock was *bona fide* or for a valuable consideration, or that it passed any interest of said Harper thereto.

2nd. For further defense defendant says that at the time of the assignment of said Harper on the 21st day of June, 1887, the said Harper and Matthews were both residents and citizens of Hamilton county, State of Ohio; that said Harper was hopelessly insolvent and was then contemplating the making of the assignment which he subsequently made, as referred to by this defendant in his answer and cross-petition in the consolidated cases herein, which facts are well known to both said Matthews and said Otten, at the time of the pretended transfer of said shares of stock to said Otten; and this defendant says that the said transfer and conveyance of said shares of stock to said Otten by said Harper was made for the purpose and with the intent to defraud the creditors of said Harper of their just and lawful debts, and defendant says that under and by virtue of the laws of the State of Ohio, Revised Statutes, volume 1, sec. 4196, which said law was then and is now in full force and effect and provides as follows, to wit: "Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods, or chattels and every bond, judgment, or execution made or obtained with intent to defraud creditors of their just and lawful debts or damages or to defraud or deceive the person or persons purchasing such lands, tenements, hereditaments, rents, goods, or chattels shall be deemed utterly void and of no effect"—

The said alleged transfer and assignment by said Harper of said shares of stock was fraudulent and void and of no effect, and that the title to and ownership of the said shares of stock passed under the deed of assignment of said Harper to this defendant, who is now the legal owner and holder of the same and entitled to have and receive the proceeds of the same, to be administered by him as the law in such cases in the State of Ohio made and provided directs. The said Harper at the time of said alleged transfer was largely in debt, and numerous claims then existed and now exist against his said estate, on which only a small percentage can be paid from the assets and estate of the said Harper, they being wholly insufficient for the purpose of discharging the legitimate liabilities of said Harper.

3rd. For further defense defendant says that at the time said Harper made said alleged transfer of said share- of stock in said association to said Otten he, said Harper, was hopelessly insolvent, and within a few hours thereafter said Harper made the assignment for the benefit of his creditors under which this defendant claims, as set out in his answer and cross-petition herein, to which reference is here made, and said alleged transfer and conveyance to said Otten or said Matthews, as claimed by her, was made without any valuable consideration whatever therefor and was illegal and void and

of no effect as against the then existing creditors of said Harper and against this defendant, the representative of said creditors. Said Harper at said time was largely in debt, and numerous claims then existed and now exist against his said estate, on which only a small percentage can be paid from the assets and estate of said Harper, they being wholly insufficient for the purpose of discharging the legitimate liabilities of said Harper.

4th. For further defense this defendant says that at the time of the alleged transfer of said stock in said association to said Otten said Harper was hopelessly insolvent and within a few hours thereafter made the deed of general assignment for the benefit of his creditors and under which this defendant claims the said shares of stock, as set out in his answer and cross-petition herein, to which reference is here made. The said transfer of assignment to said Otten or Matthews, as it may be, was made by said Harper with the intent to delay, hinder, and defraud his then existing creditors, the said Otten and Matthews being well aware of the insolvency of said Harper and of the purpose and intent of said Harper in making said alleged transfer when it was made; and defendant says that said transfer and assignment was illegal and void as to the then creditors of said Harper and this defendant, their representative, and passed no title to said shares of stock to said Otten or Matthews, but the same passed to and now belongs to this defendant under the said deed of assignment of said Harper to this defendant, who is now the owner thereof and entitled to have the said stock and its proceeds, as trustee under said deed, to be administered under said trust.

5th. For further defense defendant says that at the time of the alleged transfer and assignment of said shares of stock in said association by said Harper to said Otten or said Mathews, if the same was made for her benefit, as alleged by her in her answer herein, the said Harper was hopelessly insolvent and in contemplation of insolvency and of the making of the deed of general assignment of all his property for the benefit of all his creditors, as subsequently made by him within a few hours of the time of said alleged transfer to said Otten; and if the transfer were made for the benefit of said Mathews, as claimed and alleged by her, it was made by said Harper with the intent to prefer her over his other creditors (if she was a creditor, which defendant denies) and was void under and by virtue of the laws of the State of Ohio, of which State said Harper and said Matthews were then citizens and where they then resided and where said deeds of assignment by said Harper was made, sec. 6343, volume 2, page 1332, Revised Statutes of the Laws of the State of Ohio, which laws were then and are now in full force and effect, and which read as follows, to wit: "All assignments in trust to a trustee or trustees made in contemplation of insolvency with the intent to prefer one or more creditors shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter." The said transfer or assignment inured to the equal benefit of all the

creditors of said Harper to be administered by this defendant under the law in such cases made and provided and under his trust as trustee of said Harper, and this defendant is entitled to have said shares of stock and their proceeds to administer the same under his said trust.

Wherefore, having fully answered the cross-petition and replied to the answer of the defendants Otten and Matthews, he prays as in his original answer and cross-petition, and for all proper relief in the premises.

C. L. RAISON, JR.,
TAFT & LLOYD,
Att'ys for Lloyd, Trustee.

STATE OF OHIO, }
Hamilton County. }

Harlan P. Lloyd, trustee of E. L. Harper, being duly sworn, says that he believes that the statements of the foregoing reply and answer are true.

HARLAN P. LLOYD,
Trustee of Estate of E. L. Harper.

Subscribed in my presence and sworn to before me this 4th day of January, 1888.

WM. S. WALKER,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

And at the January term of the court, on the 13th day of January, 1888, the following order was made, to wit: Lloyd, trustee, moves to set aside the order of January 11th, 1888, which sets aside the filing of his answer, and Brownell objects. The *the* court overruled the objections, and the order setting aside the filing of Lloyd's answer is set aside, and on motion of Lloyd, trustee, this cause is submitted upon his cross-petition and the whole case, and Brownell excepts; and Otten and Matthews move to strike the answer of Lloyd, trustee, from the files, and Lloyd, trustee, objects, and this cause is submitted on said motion.

And thereafter, at the May term of the court, on the 7th day of May, 1888, the following order was made, to wit:

Lloyd, trustee, filed motion to strike the depositions of Mrs. Harper and Hattie A. Matthews from the files, and plaintiff objects; and Lloyd, trustee, offered an amended answer and set-off and cross-petition against Hattie A. Matthews and John Otten, to the filing of which said Matthews and Otten object.

The motion to strike depositions from the files referred to in foregoing order is in words and figures as follows, to wit:

Campbell Chancery Court.

ALBERT SILVA, &c., Pl'ffs,
vs.
FIDELITY NATIONAL BANK, &c., Def'ts.

Motion of Lloyd, trustee, to strike depositions of Mrs. Harper & Miss Matthews from the files.

The defendant and cross-petitioner Harlan P. Lloyd, trustee of E. L. Harper, now comes and moves the court to strike the deposition- of Emma F. Harper and Hattie A. Matthews from the files of this court and to suppress them because—

1st. Mrs. Harper is the wife of the defendant E. L. Harper, of whose estate H. P. Lloyd is trustee, and said Emma F. Harper testified in her said deposition in favor of said Mathews and against said E. L. Harper and his trustee, Lloyd, and is incompetent as a witness in said matter and controversy between said Harper and his trustee, Lloyd, and said Matthews.

2nd. Said E. L. Harper, of whom said Lloyd is trustee,— at the time said depositions were taken and is now confined in the penitentiary in Columbus, State of Ohio, as a prisoner and convict under a sentence of ten years for embezzlement and fraudulent conversion to his own use of the funds and assets of the Fidelity National bank, and said testimony of said Matthews is in favor of herself and against said Harper and his trustee, Lloyd, and said Matthews is an incompetent witness in her own behalf.

C. L. RAISON, JR.,
Att'y for Lloyd, Trustee.

The amended answer, set-of-, and cross-petition referred to in the foregoing order is in words and figures as follows, to wit:

Campbell Chancery Court.

ALBERT SILVA, &c., Plaintiffs,
vs.
FIDELITY NATIONAL BANK, &c., Defendants.

Amended answer, set-off, and cross-petition of Harlan P. Lloyd, trustee of estate of E. L. Harper, ag'st John Otten & Hattie A. Matthews.

Harlan P. Lloyd, trustee of the individual estate of E. L. Harper, now comes and amends his answer to the cross-petition of Hattie A. Matthews and John Otten herein, and says that he denies that on the day the alleged transfer of the twenty shares of stock in the Fidelity Building and Saving & Loan Company was pretended to have been made by said E. L. Harper to the defendant Otten, to wit, June 21st, 1887, there was due to said Hattie A. Matthews from said E. L. Harper on the note for $5,000.00, set out in the petition and filed therewith, over the sum of $7,000.00, or that there was anything whatever due on said note. There was nothing due from

said Harper to said Matthews at said time on account of said note or otherwise.

He denies that at the time of the alleged transfer — said shares of said building association stock to said Otten it was only worth $4,188.88 or thereabouts. It was worth at said time over $4,900.00. He denies that there is yet $3,000.00 or any other sum due on said note or otherwise from said Harper to said Matthews. This defendant further says that since the filing of his last pleading herein, to wit, January 4th, 1888, he has discovered that E. L. Harper, on the 5th day of January, 1883, sold and transferred to said Hattie A. Matthews 50 shares, of the par value of $100 each share, making the sum of $5,000.00, of the capital stock of the Swifts iron and steele works, which was either delivered to and received by said Matthews in full satisfaction of the claim against said E. L. Harper, if any she had, or the transfer was without any consideration whatever, and this defendant and cross-petitioner cannot state which part is true, but he says that one or the other is true.

He says that said stock at said time was reasonably worth the sum of $100 a share, the par value of said stock, and that if said stock was not transferred by said Harper and received by said Matthews in satisfaction of her claim against said Harper to the extent of the same, then she is in debt to and there is due and owing to this defendant and cross-petitioner, as trustee of said Harper, from the said Mathews the sum of $5,000.00, with interest from the 5th day of January, 1883, which sum in such case is just, due, and unpaid either in whole or in part.

He prays the court that an account may be taken to ascertain what sum, if any, was due from said Harper on the said 5th day of January, 1883, and that if upon such accounting anything be found to have been due from said Harper to said Matthews that the value of said stock, to wit, $5,000.00, may be set off against said claim as of date Jan'y 5th, 1883, and that he may have judgment against her for the unpaid balance on said stock, or that if it should appear upon such accounting that there was nothing due to said Matthews on said date that then he may have judgment against said Mathews for the sum of $5,000.00, with interest from the 5th day of January, 1883, and costs, and he makes the pleading an amended answer, set-off, and cross-petition against said Matthews and Otten, and prays for all general and proper relief in the premises.

C. L. RAISON, JR.,
TAFT & LLOYD,
Att'ys for Lloyd, Trustee.

STATE OF KENTUCKY, }
Campbell County. }

C. L. Raison, Jr., being duly sworn, says that he is the agent and attorney for Harlan P. Lloyd, trustee of E. L. Harper; that said Lloyd, trustee, is now absent from this county and State, and this affiant says that he believes that the statements of the foregoing amended answer, set-off, and cross-petition are true.

C. L. RAISON, JR.

Subscribed in my presence and sworn to before me this 7th day of May, 1888.

JOHN C. SCHROLL, *Clk*,
By A. L. RENSCHER, *D. C.*

And at the same term of the court, on the 9th day of May, 1888, the following order was made, to wit:

Lloyd, trustee, filed exceptions to the depositions of Mrs. Harper, Hattie A. Matthews, John H. Matthews, John N. Otten, and A. P. Gahr.

The exceptions to depositions referred to in foregoing order *is* in words and figures as follows, to wit:

Campbell Chancery Court.

ALBERT SILVA, Pl'ffs,
vs.
FIDELITY NATIONAL BANK, &c., Def'ts.

Exceptions of Lloyd, trustee, to depositions of Emma F. Harper, John H. Matthews, John H. Otten, A. P. Gahr, and Hattie A. Matthews.

1. Lloyd, trustee, excepts to the whole deposition of Emma F. Harper and Hattie A. Matthews, and asks that the same may each be suppressed and held to be incompetent, said witnesses being incompetent to testify in this cause in favor of said Hattie A. Matthews and against E. L. Harper and H. P. Lloyd, trustee of his estate, because—

1. The witness Emma F. Harper is the wife of the defendant E. L. Harper, of whose estate said Lloyd is trustee, and is incompetent as a witness in this cause in favor of said Hattie A. Matthews in the matter of the controversey between said Hattie A. Matthews and said E. L. Harper and Lloyd, his trustee, &c., in these consolidated cases.

2nd. To the depositions of Hattie A. Matthews: Said Matthews is incompetent as a witness in this case in her own favor in the controversy between herself and E. L. Harper and Lloyd, his trustee, as to the ownership of the 20 shares of stock in the Fidelity Loan, Building & Saving Association because E. L. Harper, of whom she claims to have received said stock by transfer through Otten in *in* trust for her, is a prisoner confined in the State penitentiary o the State of Ohio, at Columbus, under a ten-year sentence for embezzling and converting to his own use the funds and property of the Fidelity National bank. Said Harper made an assignment for benefit of creditors, and said Lloyd is the trustee under said assignment.

3. Exceptions to Hattie A. Matthews' deposition: He excepts to question and answer No. 2 because said Matthews is incompetent to — the facts, and especially as to the amount owed her by E. L. Harper August 8th, 1881.

4th. He excepts to question and answer 6 of the direct examination of the witness because same is incompetent and irrelevant and

purports to *to* give statements of E. L. Harper about which he is disqualified from and incompetent as a witness to testify.

5th. To question and answer 8 in direct examination of the witness because incompetent and irrelevant.

6. He excepts to question and answer 9 in re-examination of the witness because incompetent and irrelevant.

7th. He excepts to question and answer 10 in same examination for same reason.

8. He excepts to question 11 in same examination because it is leading, and also incompetent, for reasons that Harper cannot testify.

Lloyd, trustee, excepts to the following questions and answers of the depositions of Emma F. Harper:

1st. He excepts to so much of the answer to question 4 in the direct examination of the witness as attempts to state that Miss Matthews gave money to E. L. Harper, what Harper did with it, and what Harper told her about the matter because the same is incompetent and irrelevant.

2nd. He excepts to question 5 and answer thereto because incompetent and irrelevant.

3. To question 6 and answer thereto for same reason.

4. He excepts to question 7 and answer thereto because incompetent and irrelevant and not competent against Harper or Lloyd, trustee.

5. To question 9 thereto and answer for same reasons.

He also excepts to the following questions and answers in the depositions of James H. Matthews:

1. He excepts to so much of the answer to question 3 as states that the money of Miss Matthews was given to Harper, and that he invested it, because incompetent as against Lloyd, trustee, and E. L. Harper.

2. He excepts to the whole of the answer to question 4 because incompetent and irrelevant as against Lloyd, trustee, and Harper.

3. He excepts to question 5 and answer thereto for same reasons as above.

4. He excepts to questions 7, 8, 9, and answers thereto for same reasons.

5. He excepts to question 10 and the entire answer thereto because the same purports to give acts, statements, directions, and statements of E. L. Harper, who is disqualified by statute as a witness, and the testimony is incompetent as against Harper or Lloyd, trustee.

6. He excepts to so much of question 12 of the witness as states that Scarlett was instrumental in getting Harper to take stock, &c., in the building association for same reasons as above.

7. He also excepts to the following questions and answers of John H. Otten:

1. He excepts to question 9 and answer thereto because incompetent and irrelevant.

2. He excepts to questions 10, 11, 12 and the answers thereto because incompetent and irrelevant.

3. He excepts to all of the answer to question 10 except the fol-

lowing: "When I asked him for this money the demand was written," because incompetent and irrelevant.

4. He excepts to question 1 and answer thereto in redirect examination of the witness because incompetent and irrelevant.

He also excepts to the following questions and answers in the deposition of Albert P. Gahr:

1. He excepts to so much of the answer to question 2 in the direct examination as undertakes to state any of the acts, statements, and admissions of E. L. Harper because the same are incompetent as against Harper and Lloyd, trustee.

2. He excepts to the question 3 and answer thereto because incompetent and irrelevant as against said E. L. Harper and Lloyd, trustee.

3. He excepts to question and answer 6 because incompetent and irrelevant.

Wherefore Lloyd, trustee, asks that his said exceptions may be sustained.

C. L. RAISIN, JR.,
TAFT & LLOYD,
Att'ys for Lloyd, Trustee.

And at the same term of the court, on the 11th day of May, 1888, the following order was made, to wit:

This cause is submitted on Lloyd's exceptions to depositions and on the offer to file amended answer and cross-petition of Lloyd, trustee.

And at the same term of the court, on the 14th day of May, 1888, the following order was made, to wit:

The exceptions of Lloyd, trustee, filed May 7th and 9th, 1888, to the depositions herein are overruled and Lloyd, trustee, excepts, and the amended answer and set-off and cross-petition offered May 7th, 1888, by Lloyd, trustee, the verification of the same being waived, *is* refused and Lloyd, trustee, excepts, and on his motion the same is made part of the record.

And at the same term of the court, on the 18th day of May, 1888, the following order was made, to wit:

Came Hattie A. Matthews and filed reply to the answer and cross-petition of Lloyd, trustee.

The reply of Hattie A. Matthews to answer and cross-petition of Lloyd, referred to in the foregoing order, is in words and figures as follows, to wit:

Campbell Chancery Court.

ALBERT SILVA, Pl'ff, *vs.* FIDELITY NATIONAL BANK & CONSOLIDATED CASES, Def'ts.	Reply of Hattie A. Matthews to Answer and X Petition of H. P. Lloyd.

The defendant Hattie A. Matthews, for reply to answer and cross-

petition of H. P. Lloyd's, says she admits E. L. Harper was insolvent when he assigned the building association stock to her.

She admits that he assigned the stock to her with the intention to prefer her to the exclusion of the creditors, but, as was stated in her original pleadings, this was allowable under the laws of Ohio.

She denies that under the provisions of the laws which are set out in said pleading of Lloyd, to which this is a reply, that there is anything which invalidates the transfer of the stock to this defendant, the same involved in the case.

Wherefore the defendant prays as in her original pleadings and for general relief.

JNO. S. DUCKER,
Att'y for Hattie A. Matthews.

And thereafter, at the September term of the court, on the 3rd day of September, 1888, the following order was made, to wit:

Lloyd, trustee, moved the court to set aside the judgment overruling the exceptions of May 7th and 9th, 1888, to depositions, and this cause is submitted on said motion.

And at the same term of the court, on the 5th day of September, 1888, judgment on exceptions to depositions was rendered as follows, to wit:

Mrs. Harper cannot testify against her husband. If her testimony is introduced to establish the claim of Hattie A. Matthews against the estate of Harper it is incompetent. The claim must be established by other evidence. If her evidence or testimony is used to show that Matthews is entitled to satisfaction and of a particular fund it is not perceived that such testimony is against the husband of the witness, because if Matthews is not thus satisfied her husband will remain bound to Matthews.

If Matthews' deposition was taken after Harper was sent to the penitentiary it cannot be read to establish her claim against Harper. The claim itself may be established by competent evidence. This being done, it is not perceived that Matthews may not prove an assignment to her in satisfaction of her claim which would not effect Harper, but other creditors of Harper. Hattie's deposition was given on the 16th day of April, 1888. If Harper was then in the penitentiary her deposition cannot be read to establish her claim against him. The exceptions will be retained, and on the trial the testimony to which objection is made in them will be tried by the principles stated in this judgment and order.

And at the same term of the court, on the 5th day of Sept., 1888, the following order was made, to wit:

Came Lloyd, trustee, and offered an amended answer to the amended answer and cross-petition of Matthews, Otten, &c., to the filing of which Matthews, Otten, &c., object, and on motion of Lloyd, trustee, and Matthews & Otten, &c., this cause is submitted on the offer to file same and on the whole case.

The amended answer of Lloyd, trustee, to amended answer and

cross-petition of Matthews, Otten, &c., referred to in foregoing order is in words and figures as follows, to wit:

Campbell Chancery Court.

ALBERT SILVA
vs.
FIDELITY NATIONAL BANK, &c. } Amended Answer to X Petition — Matthews.

The defendant Lloyd, trustee of E. L. Harper, says that he denies that on the 21st day of June, 1887, when it is alleged that Harper transferred the said shares of stock, as alleged in the amended answer and cross-petition of Matthews and Otten, filed January 4th, 1888, that there was due something over $7,000.00 on said note from Harper to Matthews. He denies that there was anything whatever or any sum due from Harper to Matthews on said note at said time. He denies that at the time of the alleged transfer of said stock the said building association shares were only worth the sum of $4,188.88, or that said Harper now owes the said Matthews over at least $3,000.00 yet on said indebtedness after crediting said stock. There was nothing due on said note at said time. The shares of stock were worth at said time $4,914.87.

C. L. RAISON, JR.,
Att'y for Lloyd, Trustee.

STATE OF KENTUCKY, }
Campbell County. }

C. L. Raison, Jr., being duly sworn, says that he is the agent and attorney of Harlan P. Lloyd, trustee, who is now absent from this county and State, and that he believes that the statements of the foregoing amended answer are true.

C. L. RAISON, JR.

Subscribed in my presence and sworn to before me this 4th day of September, 1888.

JOHN P. SCHROLL, *Clk*,
By A. L. RENSCHER, *D. C.*

And thereafter, at the same term of the court, on the 7th day of September, 1888, judgment was rendered in words and figures as follows, to wit:

The said fund accrued and arising upon said 20 shares of stock of said building association involved in these causes belongs to said Lloyd, trustee, to be administered for the benefit of the creditors of E. L. Harper, and it is adjudged by the court that all the actions and cross-actions in this consolidation other than the cross-action of the said Lloyd, trustee, be, and they are hereby, dismissed at the costs respectively of the parties suing, and the attachments are discharged.

It is also adjudged by the court that said Lloyd, trustee, is the owner of and entitled to the immediate possession of said "pass book" of E. L. Harper in said building association filed by said

Matthews and Otten with their cross-petition herein, and the clerk of this court will deliver the said "pass book" to the said Lloyd, trustee. The said shares of stock in the building association of said Harper amounted, in the amounts paid in and the dividends thereon on the 13th day of July, 1887, when the same became converted into a money demand against the association, to the sum of $4,914.89.

It is adjudged that Lloyd, trustee, recover of the Fidelity Building, Savings & Loan Company for the sum of $4,914.89 without interest, and when said sum is paid said Lloyd, trustee, will deliver said "pass book" to said association. The said Lloyd, trustee, will pay the costs of these proceedings other than the costs adjudged against the parties other than said Lloyd, trustee. Hattie A. Matthews and John Otten except to this judgment and pray an appeal to the court of appeals, which is granted.

* * * * * * *

(Record, p. 59.)

Afterwards, at a court of appeals held on the 24th day of October, 1889, the following order was entered herein, to wit:

This cause came on and was heard.

Afterwards, at a court of appeals held on the 27th day of Feb., 1890, the following order was entered herein, to wit:

The court being sufficiently advised, it seems to them that the judgment herein is erroneous. It is therefore considered that said judgment be reversed and cause remanded, with directions to render a judgment in conformity to the opinion herein, which is ordered to be certified to said court. It is further considered that appellant recover of appellees costs herein.

* * * * * * *

(Record, pp. 94 to 100, incl.)

* * * * * * *

Afterwards, at a court held on the 26th day of April, 1890, the court being sufficiently advised, the opinion is extended on its face and the petition for rehearing is overruled.

Extended Opinion.

June 21st, 1887, E. L. Harper made an assignment for the benefit of his creditors.

A few hours before doing so he directed the brother of the appellant, Hattie A. Mathews, to get John Otten to go to an office of the Fidelity Loan Company and get from him his, Harper's, "pass book" evidencing his ownership of twenty shares of stock in the company, then worth from four to five thousand dollars, and draw the value of it by a withdrawal from the company and pay it over to the appellant, Hattie A. Matthews. Otten got the pass book, but found he could not draw the money without an assignment of the stock from Harper. He was selected to do so because it was supposed that his relations with the company would enable him to readily get the money. Not succeeding, he took the pass book to the brother, who filled up an assignment of the stock upon a leaf of it in Otten's name and procured Harper to sign it. It was then delivered to her brother for the appellant, Hattie A. Matthews. He then gave it to Otten in order that he might draw the value of it from the company and pay it to her. The company declined, however, to comply with the request, as when it was made Harper had made the assignment for the benefit of his creditors. The transfer of the stock did not show that it was for the benefit of Hattie A. Matthews, but this was the understanding at the time of all the parties, as it is indisputably shown by the evidence.

It, aside from that of the appellant, Hattie A. Mathews, and Harper's wife, whose testimony was objected to because he was in the penitentiary and one of them was his wife, also shows that at the time of the transfer he was indebted to the appellant, Mathews, in a sum greater than the value of the stock, and that it was made by way of part payment.

It is therefore unnecessary to determine the competency of the appellant and Harper's wife as witnesses or whether any portion of their testimony is competent. It appears that the appellant received from her father's estate in 1880 about one thousand dollars. She then resided with Harper, who was her brother-in-law, and continued to do so up to the time of his failure and perhaps longer. She turned the money over to him for investment. He was then a wealthy man, and continued to be so regarded until shortly before his failure. He was utterly wrecked financially, and became an inmate of a prison through reckless speculation, which, *ignis fatuus* like, led him on even to the commission of crime. The investment for her

by him resulted in great gain in a short time, and in settlement of what was coming to her through it he, on August 8th, 1881, executed to her his note for five thousand dollars, no part of which had been paid at the time of his failure, save the interest to January 1st, 1882.

June 24th, 1887, certain of his creditors served out attachments in the Campbell chancery court and attached the interest in the loan company that had been transferred to the appellant, but in the name of Otten, for the purpose of collection for her. September 16, 1887, she, by answer and cross-petition against the trustee of Harper under the deed of assignment, became a party to the consolidated suits of these creditors. She claimed the stock, her pleadings setting forth the grounds of her claim and Otten joining with her in it. January 4th, 1888, the trustee, in answer to her cross-action, set up a claim to the stock under the deed of assignment. The creditors are not parties to this appeal, nor are their pleadings made a part of the record before us.

In the consideration of the matters involved we will waive the question of the right of the trustee to assert in a suit a claim to the stock when the assignor in the voluntary assignment could not do so.

The evidence fails to show that the appellant's *dede* was a fraudulent one, nor is a state of circumstances shown from which we are authorize- to presume it. This is also true as to her claim to the stock in the loan company, based upon the transfer in Otten's name. No fraudulent purpose is shown even by inference. It was, however, undoubtedly intended as a preference of the appellant as a creditor by Harper as a debtor. Indeed, this is expressly admitted by her pleadings.

The parties all resided in Ohio and the entire transaction occurred there. Its validity is therefore to be tested by the law in force there. The deed of trust was also made there. At common law a debtor had a right to prefer a creditor, either by a payment or an express preference, in a deed of assignment. He has a right to pay his debt, and it is only by virtue of statutory law that such a payment can be held invalid and the creditor compelled to surrender his advantage.

In the absence of any showing of the existence of such a statute in another State, it must be presumed that the common law is in force there.

Honore *v.* Hutchings, 8 Bush., 687.
Miles *v.* Collins, 1 Met., 308.

The appellee has in his pleadings set out a section of an Ohio statute which reads thus: "All assignments in trust to a trustee or trustees, made in contemplation of insolvency, with intent to prefer one or more creditors, shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims, and the trust arising under the same shall be administered in conformity to the provisions of this chapter," and which he claims invalidates a preference like this one. We are unable to judge of it by its title

and its other sections, as the entire statute is not before us. It does not appear to us, however, to embrace a case like this one, but to relate alone to preferences made in deeds of assignments to trustees for creditors generally.

Certainly no such trust was created in the transfer of this stock as this statute contemplates. None was intended. Otten was not named as trustee for the appellant. He was but an agent to draw the value of the stock for her, and then at once to pay it over to her.

The preference was a *bona fide* one. It was made by the assignment and delivery of the written evidence of the ownership of the stock. The preponderance of the testimony shows that the transfer was made in the morning and the assignment not until the evening of the same day. In any event, they were not made or even prepared at the same time. It was not one transaction, and the written transfer of the stock and the assignment cannot upon the evidence be regarded as really constituting but one instrument. If they could be, then the transfer of the stock would, perhaps, fall within the interdiction of the statute as being in fact a part of the deed of assignment.

The rules of the common law govern the transaction, and, when so considered, it is not invalid, because a payment of a pre-existing debt in view of coming insolvency is not forbidden by them.

It is urged that such a preference is contrary to the statute of this State, and will not therefore be upheld by its courts. It is true, comity does not require one State to violate its own laws to enforce those of another. Such a preference is not fraudulent or void, however, under our statute. Upon the contrary, it operates as an assignment, not only of the particular property embraced by the preference, but of all the debtor owns for the payment of his debts *pro rata*, provided advantage be taken of it in the manner and within the time prescribed by the statute. It merely inures to the benefit of all the creditors if they or any of them so ask in proper time and manner. It is a privilege given them.

If an assignment made in another State and valid there be contrary to the law or the settled policy of this State, it will not be enforced here to the prejudice of our own citizen creditors.

It does not appear, however, that any citizen of this State will be prejudiced by the preference in question. The appellant may certainly come into court and assert her claim. She may sue. Her adversary is a non-resident. It does not appear that any of the creditors are residents. If any presumption is to be indulged, it is that they are residents of Ohio, where this transaction occurred, because the deed of assignment was made there and the trustee resides there. No citizen of this State is questioning her right. Under this state of the case the appellant, inasmuch as the preference was valid where made, should not, in our opinion, be turned out of court.

The appellee is not in a position to deny the right of the appellant to relief because Harper was not before the court upon the cross-pleadings. She is claiming to be the owner of the stock and did become at least the equitable owner by the transfer to Otten,

the legal title being in him. The appellee claims it under the deed of assignment to him. In any event, Harper is not the owner, and he was not therefore a necessary party to the contest over the ownership between these two claimants. He had parted with the right to it to one or the other of them, beyond all question.

It is urged that the second paragraph of the answer and reply of the trustee, in which it is averred in affirmative form that at the time the transfer was made Harper was contemplating an assignment, and that it was therefore fraudulent, and so in fact, is undenied, and that it must therefore be so held. Its averments must, however, be regarded as statements *negotiating* those of the cross-petition of the appellant. It is therein averred that the transfer was *bona fide* and upon sufficient consideration, and these averments of the answer and reply of the appellee are in substance but contradictory of them, although couched in affirmative language.

The transfer was in fact made. It was not fraudulent, nor as a preference was it forbidden by the *lex loci*, and it must be upheld.

The judgment is reversed, with directions to render one for the appellant in conformity to this opinion.

* * * * * * *

Office Supreme Court U. S.
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CLERK.

IN THE

SUPREME COURT OF UNITED STATES

Eugene Standley and John Boyd, Plaintiffs in Error.

vs. } *INDICTMENT FOR MURDER.*

The United States, Defendant in Error.

Abstract, Brief and Argument for Plaintiffs in Error

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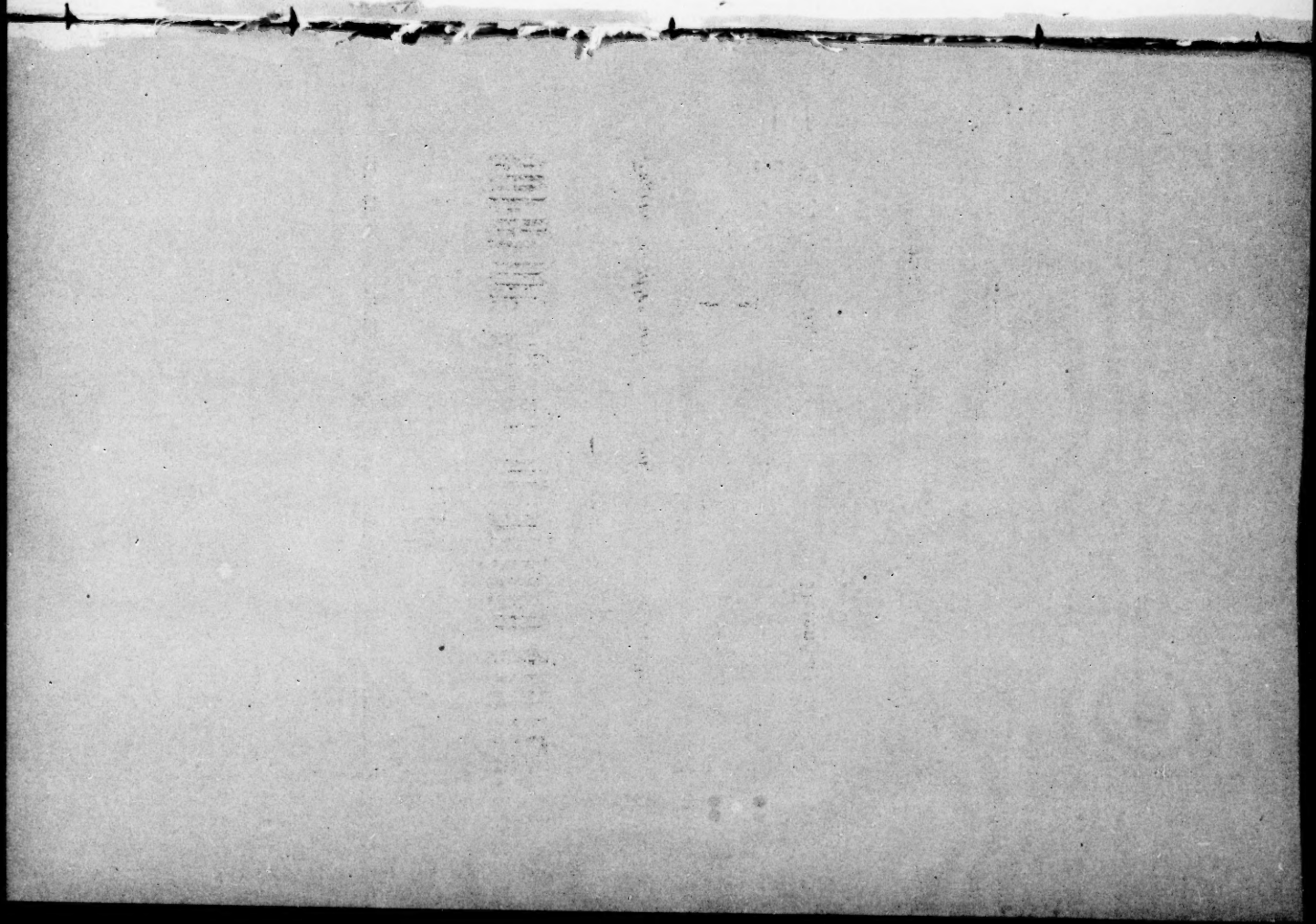

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Abstract, Brief and Argument for Plaintiffs in Error.

STATEMENT.

The plaintiffs in error, Eugene Standley and John Boyd, were jointly indicted in the circuit court of the United States for the western district of Arkansas, charged with the crime of murder, by killing one John Dansby, in the Indian country,

in the western district of Arkansas. The indictment alleges that Dansby was a Negro, and not an Indian; that the crime was committed by shooting deceased with a gun.

It appears, from the evidence, that the defendants below and one Davis, *alias* Myers, came to a ferry at Martin Byrd's, on Cache creek, in the Indian country, about nine o'clock at night and called to the ferryman, Martin Byrd, who lived about 100 yards from the ferry, to come and set them over the stream. Byrd told them that he did not like to set people over after night, but after talking some time with them said he would get the key to the boat and set them over. It was quite dark then and the defendants were on the opposite side of a slough which prevented them from getting to the ferry-boat, and was between them and the house. Byrd delayed coming for considerable time, he says, and defendants say 1½ hours. When he did come he was accompanied by his brother, Joseph Byrd, and deceased, John Dansby, and Richard Butler. In the meantime the defendants had kindled a fire and while waiting for Byrd had discovered a log lying across the slough and had crossed over and Boyd had gone onto the boat and was sitting in the back end of it, while Davis and Standley were sitting upon the bank. From this point the evidence conflicts in regard to what precipitated the conflict. The prosecution claimed that it was as Martin Byrd testified, that said Byrd came to the boat and was feeling for the lock and preparing to unlock the chain which held the boat when Davis said

"Lay down that chain and throw out your rusty change." That Byrd said "don't you want to cross ?" and Davis said "Hell, no, its your money we're after!" and drew a pistol, that Dansby started towards Byrd and Boyd shot him in the back and that Byrd fell forward on his knee and drew his pistol just as Davis fired at Byrd and missed, the ball passing over Byrd's head ; that Byrd fired and hit Davis and then fired after he fell, one shot striking Davis in the center of the forehead, the other in the inner corner of one eye. Davis died instantly. Firing immediately became general after the first shot. He says Boyd shot Dansby in the back and Richard Butler shot Boyd with a shot gun, in the back ; that Standley fired at Jo Byrd and that Jo Byrd shot Standley, who fell, and that Boyd ran up the river and all followed him and that Standley then got up and ran off; that Boyd was found badly wounded and brought to the house of Martin Byrd.

On the other hand the defense claimed that the facts were as testified to by Standley, that while Boyd was sitting in the boat and Standley and Davis on the bank, the ferryman and his party came around with winchester rifles and revolvers and before they suspected anything had leveled their guns on him and Davis and told them to give up their pistols ; that they had the description of some men that had robbed Judge Taylor, that he handed up his pistol which they took and Davis drew his out but whether to comply or to resist he does not know, that they fired on Davis and killed him; that he turned

and as he did so was shot in the shoulder and fell, the ball remaining under the point of the shoulder blade; that they ran after Boyd and while they were gone he picked up Davis's pistol and ran off and hid.

Boyd was brought down under arrest and lodged in jail, and the dead body of Davis was also brought to the jail yard, and about two weeks afterwards Standley was arrested.

On the trial, the jury found the defendants both guilty of murder.

Motions for new trials were filed, argued and overruled, the prisoners sentenced to be hanged. A bill of exceptions was allowed and filed and an assignment of errors filed and a writ of error to the Supreme Court granted.

BRIEF AND ARGUMENT.

While not waiving any of the errors assigned, it is proposed here to argue only a few of the principal ones.

3. The third assignment alleges that it was error to admit the testimony of F. M. Rigsby as to a robbery of his store and also to admit the details of said robbery. He testified that on the afternoon of April 5th his store was robbed by three men who were these two defendants and Davis; they took many articles from the store and some money and his coat and vest off his back, and gave full details of what they said and did, as if defendants had been on trial for this robbery.

This robbery was the day before the time of the killing and the spot is 30 or 40 miles away from the place of the killing. It was claimed by the Government that this testimony was admissible to identify the prisoners as the men who killed Dansby, and was admitted on that ground. But for that purpose it was wholly unnecessary. Boyd was shot in the encounter, was captured on the field, was known and recognized by his captors, his antagonists in the fight, was never out of their custody until he was transferred to the jail, whence he was brought before the jury, and there did not deny that he was present at the fight. Surely it was a work of supererogation to show for the purpose of identification thai this man committed a robbery at Rigsby's.

It was equally unnecessary to show it to identify Davis. Davis was shot dead on the field, falling with two mortal wounds on his body. His corpse was brought to the jail yard by the victors. There was no doubt that he was present at the killing.

Perhaps Standley needed identification, though Byrd claimed to recognize him and if Rigsby had seen him at the killing he might know he was the same man that he saw at the store, but he did not see Standley at the killing, so the connecting link is wanting.

Neither were any articles taken at Rigsby's found on Standley or in his possession, except a pistol which belonged

to Davis and was picked up on the field as Standley run, as sworn to by Jo Byrd.

But this evidence was not merely cumulative and therefore harmless; for while it had no legal tendency to convict defendants its effect on the verdict of the jury in fact was dangerous and deadly.

But if we should grant that fact of defendants presence at the store and that they participated in a robbery there would tend to identify them what good purpose can the details and minutiae of that crime answer? They will not help to identify, but they will inspire in the minds of the jury loathing disgust and prejudice towards the prisoners and swell the chorus of "away with them."

If defendant Standley admitted on the stand that he was at Rigsby's, it was asked him by his counsel after all this had gone in over objections and was the settled ruling of the court and the damaging facts were fully in possession of the jury. But he was not asked as to the *details* of the crime, and did not admit anything or waive anything as to that objection.

7. Reserving the 6th assignment for comment later on, let us take up the 7th, which is similar to the 3rd. It alleges error in admitting the testimony on cross-examination of defendant Standley as to the robbery of John Taylor and also the details thereof.

Counsel for the Government asked defendant Standley on cross-examination if he was not guilty of the robbery of John Taylor some weeks before the killing. Defendant admitted he was concerned in that. This was the first reference, in the testimony to that robbery. If as a witness he could be asked such a question to discredit him, and he had denied it, his answer would have been conclusive. It was a collateral matter and could not be contradicted.

Fletcher vs. Boston etc. 1 Allen 9; 79 Am. Dec. 695.
1 Greenleaf Ev. sec. 449.

Defendant admitted it, which ought also to have settled it. But instead of this the counsel for the prosecution occupied eight pages of the stenographer's notes of the testimony in bringing out the minute details of the affair, answering no legal purpose, unless it was proper to so prejudice the jury against him that they would conclude that such a wretch had no right to exist on the face of the earth, and that because he was guilty then he must be guilty now.

8. The 8th assignment relates to the evidence of this same robbery of John Taylor as in the 7th assignment, but as founded in the testimony of John Taylor. He was asked all about the robbery and every detail for the first time on cross-examination by counsel for the Government.

It was claimed on the trial by the prosecution that this testimony was to show that a crime had been committed which would justify the Byrds and their crowd in arresting the defendants. But all the Government witnesses who were present at the killing, swore positively that there was no attempt to arrest defendants, or any desire to do so, or any belief or suspicion that defendants were concerned in the robbery of John Taylor. They had never heard that Rigsby had been robbed. They claim that defendants were trying to rob them. Surely if this last theory were true this testimony of John Taylor was a grievous injury to defendants. And if Standley's version of the beginning of the firing is true, there is no evidence against the defendant Standley and his conviction is contrary to *law*.

Is it a "pertinent hypothesis" for the Government to assume that Standley's claim was correct and that all its own witnesses were (not mistaken merely but) knowingly and wilfully and corruptly false, as to the overt acts resulting in the death? If so, any fact may be made relevant by absurd and contradictory theories. Again: The witnesses for the prosecution testifying that it was not their purpose at the time to arrest defendant, that they did not know who defendants were, and that they did not have the fact that a robbery had been committed anywhere by defendants in their minds at the time of the conflict, is it any justification for a deadly assault or relevant in any way to show that the adversary had in fact, at some period of his life committed a crime for which he was liable to be arrested?

Also, John Taylor was an Indian, defendant Standley was also an Indian,—both Choctaws: the robbery was an offense against the Choctaw laws, and not cognizable in the United States Courts, and therefore one which was not within the jurisdiction of the Byrds, who were United States citizens, to arrest for or intermeddle with. Both the crime and persons were wholly outside of their jurisdiction. Has a private citizen greater rights in arresting people than are possessed by an officer with a warrant?

But if the main fact of the robbery were admissible to show that a crime was committed for which the defendants were about to be arrested and in resisting which, the killing occurred, what can justify these horrible details?

9. The 9th assignment alleges error in admitting the testimony of Samuel R. Mode in regard to the alleged robbery of himself and one Richard C. Brinson by defendant Standley; and also in admitting the details of said alleged robbery. Said testimony, it appears was offered to contradict defendant Standley's statement on the stand that he was not in the Brinson robbery. This was clearly erroneous.

1 Greenleaf Ev. sec. 449.

It was immaterial to the issue here whether he was there and participated in that robbery or not and he could not be contradicted as to his testimony on this immaterial issue.

10. The testimony of Richard C. Brinson as to the robbery of himself and Samuel R. Mode, is the subject of the 10th assignment. It stands on the same ground as the 9th, and needs no further comment. It is also clearly erroneous.

11. The 11th assignment alleges error in admitting the testimony of Robert Hall as to an alleged robbery of himself by defendants Standley and Boyd; also, in admitting the details thereof.

The errors complained of in this assignment, as well as the 9th and 10th, are without any colorable pretext.

These errors in admitting proof of divers crimes was not cured by the charge of the court, but on the contrary the injury was very much aggravated by the charge. The jury was told that the robbery of Rigsby could be taken to identify the defendants and all of the other robberies to prove that a crime had been committed which would give the citizen the right to arrest. But there was no proof that the Byrd's had ever heard of the robbery of Rigsby, it had just occurred the day before in a remote part of the country, and they knew nothing of any of the crimes except the robbery of Taylor, and they swear they were not making an arrest at all.

Can all the crimes of a defendant's life be shown against him on his trial for one, to justify some one in arresting him? Would not the Rigsby case and John Taylor case, both admitted by the defendant on the stand, suffice? But after defendant Standley had admitted these and they had been proven by

other witnesses, and there could be no longer any doubt about them, he is loaded down by the three several charges of robbery on Brinson, Mode and Hall, and all the details of each.

That this accumulation of charges could not fail to convict the defendant, is evident. It now becomes necessary to see what the law is on this subject.

Wharton in his work on criminal evidence says, *section 29 :*

"To admit evidence of such collateral facts would be to oppress the party implicated by trying him on a case for preparing which he has had no notice, and sometimes by prejudicing the jury against him by publishing offenses of which, even if guilty, he may have long since repented or which may have long since been condoned. Trials would by this process be injuriously prolonged, the real issue obscured, verdicts taken on side issues. To sustain the introduction of such facts, they must be capable of being brought into a common system with that under trial." See also, to some effect,

1 Greenleaf Ev. 14th ed. sec. 52 and 448.

For the various exceptions to the rule, in regard to intent, motive, guilty knowledge, etc. see same, *secs. 29, 30, 47, 48 and 50.*

On a trial for a particular crime, the state cannot aid the proofs against the defendant by showing him to have committed another crime, even after he has put his character in issue,

this cannot be done. Cross-examination of witnesses and evidence to discredit them, by which may sometimes be brought out indifferent matter not relevant to the issue, will not be permitted a scope disclosing what tends to prove an irrelevant other crime; for this under pretence of justice, would be a wanton prejudice to the defendant's cause.

1 Bishop's Crim. Proc. secs. 1120, 1122,

The law on this point is well expressed by Mr. Justice Stephens, *Art. 10, 11, 12 and 13, Stephens' Dig. Ev.* see for same, also, *7 Am. and Eng. Ency. Law p. 58*, from which it may be seen that this case does not come within any of the recognized exceptions.

As to cases of fraud and false pretenses, etc., *see note, 44 Am. Rep. 299.*

The most recent case (decided in 1887) in which this subject has been discussed is that of *People vs. Sharp, 107 N. Y. 427;* same case, *1 Am. State Reports 851.* There Jacob Sharp, was charged with the bribery of a member of the common council of New York City, and on his trial the court admitted proof of another distinct offer to bribe.

The court, among other things, say (*p. 868*): If Sharp had given evidence of good character the prosecution might have answered that evidence by proof that his character was bad, but I believe it has not been thought by any judicial tri-

bunal that such evidence could be given in anticipation of proof from the defendant, nor that an issue upon it could be tendered by the prosecution But even in the case I have supposed such evidence would be of general reputation only, and not of particular acts by which reputation is shown.

P. 869: The learned judge in submitting the case, desired the jury to consider the Pottle evidence "as only showing the zeal which the defendant exhibited," adding, " I should be sorry if the fact that Pottle testified to the offer of a bribe should be otherwise considered So far as it tends to throw any dark shadows upon the character of the defendant, I desire you to eliminate it from your consideration and treat it merely as evidence tending to show depth of interest, motive and desire."

"These remarks point to the danger which might follow from the evidence but they *were obviously inadequate to prevent it* * * * * * * It did indeed cast a dark shadow upon the defendant's character; it not only tended very strongly to prove the defendant guilty,—it was absolute proof, but it was a different crime from that charged. It was offered and received directly on the main issue and was of great and persuasive force against him. Such evidence is uniformily condemned as tending to draw away the minds of the jurors from the real point on which their verdict is sought, and to excite prejudice, and mislead themselves. It was, we think, improperly received and the exception to its admission well taken."

In the same case, Peckham, J., reviews the cases on this subject. He says "to offer evidence of another crime for the avowed purpose of thereby showing the interest with which this money was paid to Fullgraph would have made to my mind a clear case of offering it on a colorable issue, and using it for another and wholly inadmissible purpose" * * To adopt so broad a ground for the purpose of letting in evidence of the commission of another crime, is, I think, of a very dangerous tendency. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be, in a proper condition to meet or explain, and which necessarily tend to very greatly prejudice him in the minds of the jury on the question of his guilt or innocence."

See also.

People vs. Greenleaf, 108 N. Y. 296; 2 Am. State R. 415.

State vs. Lapage 57 N. H. 245; 24 Am. R. 69.

Shaffner vs. Commonwealth, 72 Penn. State, 60; 13 Am. R. 649.

It is believed that the above authorities, and cases cited and discussed in them, show conclusively that the testimony complained of here was errroneously admitted.

6. Let us now return to the 6th assignment of errors. This alleges that it was error to exclude the testimony of James Maghee as to the statements of Richard Butler, made to him (Maghee) by said Butler about 9:30 o'clock at night, that being a half hour or an hour before the killing, and made while he was borrowing a gun with which to return to the ferry in contemplation of the difficuty which soon took place.

Maghee was a colored man, as were Martin and Jo Byrd and the deceased, and Richard Butler and lived a mile or a little over from Byrd's. Richard Butler came to Maghee's house about 9:30 at night on Sunday night (the night of the killing) and borrowed Maghee's winchester gun and returned to Martin Byrd's. Maghee heard the firing at the ferry and went down immediately and found said Richard Butler there, and the gun also. It was proved that Richard Butler had been at the ferry all day and was staying there at Byrd's all night on Sunday night (the night of the killing), and after borrowing the gun he returned to Byrd's and came with them to the ferry, and there engaged in the shooting in which Dansby was killed, and that said Richard Butler was fighting on the same side as the Byrd's and co-operating with them against the defendants, and that it was he who shot defendant John Boyd at the ferry. The defendants offered to prove by said Maghee that said Richard Butler said at the time he borrowed the gun that there were some men down to the creek—at the Rock Ford— where they kept the ferry, and he thought it was them robbers; that

was what he wanted the gun for; and also what he and the men with him were going to do with the men at the ferry—the robbers.

This testimony was competent; it was a part of the *res gestae*. "It is impossible to tie down to time the question of the *res gestae*." If the fact of his borrowing the gun just before the fight was competent, as it certainly was, then what he said a tthe time or as to what he wanted it for was also competent.

Alexander vs. United States, 11 Sup. Ct. Rep. 350.

"Where the inquiry is into the nature and character of a certain transaction, not only what was done but also what was said by both parties during the continuance of the transaction, is admissible; to exclude the most important and unexceptionable evidence. In this case it is not the relation of third persons unconnected with the fact, which is received, but the declaration of the parties to the facts themselves or others connected with them in the transaction, which are admitted for the purpose of illustrating its peculiar character and circumstances.

Where evidence of an act done by a party is admissible, his declarations made at the time having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself are also admissible as part of the *res gestae*.

Cornelius vs. State 12 Ark, 783.

Whenever what an agent did is admissible, what he said about the act is also admissible :

1 Greenleaf Ev.sec. 113.

In this case, what Richard Butler did was admitted, but what he said (which was fully as important) was rejected. This was error.

Where defendant borrowed a pistol and said he was going over to Pearman's to shoot wild hogs, held, the declaration admissible as part of *res gestae :*

Wilson vs. State 33 Ark. 557.
Pittman vs. State 22 Ark. 357.

As agent or co-conspirator the declarations of one from inception to the close of the enterprise bind all, in civil and criminal cases alike :

Nudd vs. Burrows, 91 U. S. 426.
Spies vs. People 122 Ill. 1 : S. C. 3 Am. S. Rep. 320,
See note p. 487. (*Anarchist Case.*)

It would be very unreasonable to exclude such evidence because the man himself who said it might be called, for then the party calling him would be bound by his testimony. In this case, Richard Butler was entirely identified in interest with Martin Byrd, he lived on Byrd's place one-half mile from Byrd's, they had planned and prepared for the meeting, they were hand in hand in the execution. If they were in fault in precipitating the conflict, they would be jointly liable to prosecution for the murder of Davis. His name had been endorsed on the indictment as a witness for the prosecution.

This testimony was very important to the defendants. It showed that Standley's evidence, that the Byrds were the attacking party was true and that the other theory was a sheer fabrication.

It explained the cause of the delay of Martin Byrd to go to the ferry; he was concentrating his forces. It shows the falsity of Martin Byrd's denial of having a conversation with judge John Taylor a few days before the killing in which Taylor told him of the reward he had offered, and thus supplies a powerful motive for the attack by the Byrd party

It was error to omit to charge the jury on the subject of manslaughter and of self-defense, and also of homicide in resistance of an illegal arrest.

Most cases of homicide in resisting or makiug an arrest are only manslaughter. An attempt to unlawfully arrest a man is such a provocation that a killing of the aggressor, though with a deadly weapon is only manslaughter.

2 Bish. Cr. L. 699.

The jury had a right to pass on the testimony of defendant Standley. If they believed it, mightily sustained as it was by the overwhelming contradiction of Martin Byrd by the testimony of judge Taylor as to Byrd's knowledge of the offer of a reward, and the assembling and preparations of the Byrd party, before the conflict, then the offense of the defendants was at the most only manslaughter. But the charge did not submit this phase of the case to the jury. This was error.

A. H. GARLAND,

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Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

Robert Clarke & Co., Printers. [*April, 1892.*

Supreme Court of the United States,

OCTOBER TERM, 1891.

Term No. 1,014.

Harlan P. Lloyd, Assignee of E. L. Harper,
Plaintiff in Error,

vs.

Hattie A. Mathews and J. H. Otten,
Defendants in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Brief for Plaintiff in Error, on motion filed by Defendants in Error to dismiss the case for want of jurisdiction, set for hearing April 25, 1892.

H. P. LLOYD,
C. L. RAISON, JR.

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Brief for Plaintiff in Error, on motion filed by Defendants in Error to dismiss the case for want of jurisdiction, set for hearing April 25, 1892.

This is a motion of defendants in error to dismiss the writ for want of jurisdiction, under Rule 6 of this court. Joined with it is a motion to affirm the judgment.

FIRST.

Plaintiff in error, at the outset, objects to the consideration of this motion by the court, on the ground that the essential parts of the record have not been printed, as required by the rules of this court, in order fully to present the questions involved in the motion.

In the record filed in this court, page 26, appears the amended answer of H. P. Lloyd, trustee of E. L. Harper, filed in the Campbell Chancery Court, and which was submitted to the chancellor at the hearing of the case. This amended answer formed a part of the record in the Court of Appeals of Kentucky, and is an essential part of the record on file with the clerk of the Supreme Court in this case. A reference to this answer will show that this court can not properly pass upon this motion without having the complete record before it.

The same remarks apply, with still greater force, to the petition of Lloyd, trustee, for a rehearing in the Court of Appeals of Kentucky, which appears upon page 63 of the record filed with the clerk in this case. In this petition for rehearing, which was filed according to the regular practice in the courts of Kentucky, there are set forth all the necessary averments, showing, even more fully than was done in the court below, the statutes and decisions of Ohio, under which Lloyd, trustee, claimed relief in the Kentucky Court of Appeal, and showing that a federal question was necessarily involved in the decision of the case as presented in the Court of Appeals of the State of Kentucky.

The testimony of A. P. Gahr, on page 52 of the record, is also omitted.

For the failure of defendants in error to print in their extracts these necessary parts of the record, which are absolutely essential to a proper consideration and determination of this case, the plaintiff in error asks that the pending motion may be overruled. The complete record will then be printed, and submitted to the court when it shall be reached for final hearing.

This should dispose of the motion, without further

examination by the court. That which follows is added only for the information of the court, in case the court should take a different view of the effect of these fatal omissions.

SECOND.

Statement of the case.

The following statement of facts will be of service to the court, in case it should desire to give any further attention to the motion.

On the 21st day of June, 1887, Edward L. Harper was, and for several years previously had been, a citizen and resident of the city of Cincinnati and State of Ohio. He was the vice-president and principal manager of the Fidelity National Bank, in the city of Cincinnati. He was the president of Swift's Iron & Steel Works, in Newport, Kentucky. He was the senior member of the firm of E. L. Harper & Co., largely engaged in the iron commission business, and was also doing an extensive business in his individual name as E. L. Harper. For some years prior to 1887, he had been largely engaged in speculations, and in 1887 was engaged in an enormous wheat gambling transaction in the city of Chicago, the result of which was very disastrous to him financially, was fatally disastrous to the bank of which he was manager, to the iron and steel works of which he was president, and to the business firms with which he was connected. The bank, the steel works, the business firm, and the individual, all were insolvent, and the failure of all these followed as the result of Harper's heavy losses in wheat gambling. The comptroller of the currency closed the bank on the 21st day of June, 1887, and the steel works, the firm of E. L. Harper & Co., and E. L. Harper, indi-

vidually, executed and filed in court their assignments upon the same day.

The testimony of A. P. Gahr, which forms a part of the record (page 52) in the clerk's office in this case, shows that Harper was hopelessly insolvent for some time prior to June 21, 1887, and that, as early as June 14, 1887, he had told his confidential clerk (Gahr) that he, Harper, was a ruined man, and that a general assignment by him, for the benefit of his creditors, was only a question of hours or days at the most. In the forenoon of June 21, 1887, Harper made a general assignment of his individual assets, for the equal benefit of all his creditors, under the general insolvent law of the State of Ohio. This deed of assignment was immediately placed upon record in the Probate Court of Hamilton county, Ohio, of which state and county Harper then was, and still is, a resident. All the proceedings in relation to this assignment were perfectly regular, and according to the law of the state. The assignee named in the deed accepted the trust, but failed to qualify by filing the requisite bond, and thereafter resigned the position of assignee; whereupon, in accordance with the statute of Ohio, in such case made and provided, Harlan P. Lloyd was appointed trustee under the said deed of assignment, to take possession of all the assets for the benefit of the creditors, and with all the powers and duties of the original assignee. Lloyd, trustee, is the plaintiff in error in this action.

Hattie A. Mathews is a sister-in-law of E. L. Harper, had been for a long time an inmate of Harper's family in Cincinnati, Ohio; she was such inmate at the date of Harper's assignment, and was a citizen and resident of Ohio on the 21st day of June, 1887.

On this said date, Harper, individually, owned twenty

shares in the Fidelity Loan and Building Association of Newport, Ky., which ownership was evidenced by a certain pass-book, issued by the association, and which was at that time in Harper's possession. The value of these twenty shares amounted to $4,919.89.

On or before the 14th day of June, 1887, E. L. Harper, with full knowledge of his insolvency, had determined in his own mind to make a general assignment for the benefit of his creditors. With this determination and intent fully formed, a week thereafter, to-wit: On the 21st day of June, 1887, E. L. Harper took the pass-book issued by the said building association, and transferred and assigned to the defendant, John H. Otten, as trustee for Hattie A. Mathews, the said twenty shares in the said association, by signing a form for that purpose, and delivered the book and transfer to Otten, trustee, with instructions to collect the money from the association, as trustee, and to pay it over to Hattie A. Mathews, as beneficiary of the trust. Otten, as such trustee, was unable to obtain the money from the building association, because Harper's assignment had taken place on the same day, and the officers of the association had good reason to believe that this attempted transfer was void, and that the money belonged to Harper's individual assignee, under the laws of the State of Ohio. These officers properly refused payment to Otten.

A few days later certain depositors of the Fidelity National Bank brought suits in the Campbell County, Kentucky, Chancery Court, against E. L. Harper, alleging that they were depositors, and that they had a right to collect the amounts of their deposits from the individual property of E. L. Harper in the State of Kentucky. They obtained attachments from the Campbell Chancery Court, and had

the attachments served upon the building association aforesaid, seeking thus to hold the twenty shares of stock belonging to Harper for the payment of their respective deposits in the Fidelity National Bank. Learning of these suits, Lloyd, trustee, proceeded to defend his trust, as he was bound to do, in the Campbell County Chancery Court of Kentucky. He was made a party to the proceeding, filed a plea, in which he set up at length all of the facts in the case, and especially the assignment of Harper on the 21st of June, 1887, under the insolvent law of the State of Ohio, the judicial proceedings in the Probate Court of Hamilton County, Ohio, the fact that Harper and Hattie A. Mathews were both residents of the State of Ohio on the said 21st day of June; he also alleged his regular appointment as trustee, and his claim, as such trustee, to the proceeds of the twenty shares of stock in the Fidelity Building Association of Newport, and denied all the claims in the various petitions of the plaintiffs.

At a later date the said John H. Otten, trustee for Mathews, and Hattie A. Mathews, beneficiary of the trust, were made parties defendant in the actions, which were thereupon consolidated, and the petition of Otten, trustee, and of Mathews, was filed in the Chancery Court as a cross-petition against Lloyd, trustee of E. L. Harper.

To this cross petition, Lloyd, trustee, filed an answer, repeating, so far as was necessary, the averments in his first petition, setting out in detail Harper's insolvency for a considerable time prior to the execution and filing of his deed of assignment, alleging Harper's design to prefer Mathews, through the medium of a trustee, to his other creditors, in violation of the statute law of the State of Ohio; also, the fact that Otten, trustee, and Mathews, had knowledge of Harper's insolvency, and that in making this

fraudulent preference, Harper had in contemplation his own insolvency and the making of a deed of general assignment.

Lloyd, trustee, also set forth in full the judicial proceedings in the Probate Court of Hamilton County, Ohio, alleging the force and effect thereof, and the faith and credit to be given them, and his claim under the insolvency proceedings in said court.

Lloyd, trustee, in this pleading also set up in full, sec. 6343 of the Rev. Stat. of Ohio, found in Smith & Benedict's edition of the Statutes of Ohio, 1890, Ch. 4, Vol. 4, relating to insolvent debtors, and the section was fully set forth *in haec verba:*

"Sec. 6343. (*Assignments in contemplation of insolvency to inure to the benefit of all the creditors.*)

"All assignments in trust, to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims; and the trusts arising under the same shall be administered in conformity with the provisions of this chapter." (V. 56, p. 231, sec. 13, S. & C. 712.)

In the same pleading, Lloyd, trustee, also set up sec. 4196 of the Rev. Stat. of Ohio, Smith & Benedict's edition, 1890, Tit. 4, Ch. 4, and alleged that under this section of the Ohio Statutes, the attempted transfer of the shares by Harper to Otten, trustee, was fraudulent and void. The pleading showed the section *in haec verba* as follows:

"Sec. 5196. (*Gifts, grants, etc., to defraud creditors void.*)

"Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution, made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons purchasing such lands, tenements, hereditaments, rents, goods

or chattels, shall be deemed utterly void and of no effect." (29 v. 218, sec. 2; S. & C. 656.)

No reply was made by either of the defendants to these pleadings and these allegations as to the Ohio statutes, and to the effect thereof, were thus deemed to be true by the rules of practice in the Kentucky Chancery Court, and the sections of the Revised Statutes of Ohio, and the effect thereof, were admitted as alleged, and were admitted to be fully and properly set forth in the pleadings. The only further pleading filed by the defendants Mathews or Otten, trustee, was a brief one, in which Mathews expressly admitted that E. L. Harper intended by the attempted transfer of the said shares to prefer her over his other creditors.

Testimony was taken, and the whole case was submitted to the Chancery Court of Campbell County, whereupon the chancellor decided that the claims of Lloyd, trustee, were well-founded; that the statutes of Ohio, as pleaded, must govern the case, and that the Ohio decisions, construing said statutes, should be followed, because the contesting parties were all residents of the State of Ohio, where the assignment took place, and where the entire transaction occurred. The cross-petition of Otten, trustee, and of Mathews was dismissed, and a decree was rendered by the Chancery Court in favor of Lloyd, trustee, for the full value of the said twenty shares of stock in the said Fidelity Building Association. From this decision of the chancellor, Mathews and Otten, trustee, took an appeal to the Court of Appeals of Kentucky.

Under the Civil Code of Procedure in Kentucky, an appellant is not required to take up the entire pleadings and the entire testimony in the case, but may select, at his option, such portions as he deems important for his pur-

pose, and leave the remainder of the pleadings and evidence in the court below. The appellee is not consulted as to this, nor has he any voice in regard to the matter. He is summoned in the Court of Appeals; and, without an opportunity to see the brief or to hear the argument of his adversary, is compelled to make good his own position upon the record, however imperfect that record may be, and however meager the knowledge afforded to the reviewing court by such defective record.

In the case at bar, Mathews, appellant from the Chancery Court of Campbell County, did not take to the Court of Appeals the pleading first filed by Lloyd, trustee, in this action, nor did she take to the Appellate Court the testimony showing the proceedings of the Probate Court of Hamilton County, Ohio, which were duly authenticated according to the act of congress, nor the Ohio statutes and decisions which were before the Chancery Court of Campbell County, Kentucky, on the submission of the case. But as all of these material allegations, and the testimony in support of them, were deemed to be admitted by the failure of Mathews to deny or controvert them, and, as there was no denial of the statute law of Ohio, as pleaded, or of the Ohio decisions or the proceedings of the Ohio courts, argument was made and heard in the Court of Appeals of Kentucky, as if the entire record had been before it.

The decision of the Chancery Court was based upon the construction of the statutes and decisions of the Ohio courts, and was properly in favor of Lloyd, trustee of E. L. Harper. The Court of Appeals of Kentucky, as a reviewing court, reviewing solely the questions of law, necessarily construed the same statutes and decisions of Ohio, and gave its opinion adverse to the force and construction of the Ohio statutes, which had been given to

them theretofore by the courts of Ohio. This erroneous decision of the Court of Appeals, in refusing to give to the probate proceedings in Ohio, to the statutes of Ohio, and to the decisions of the Ohio courts upon such statutes, the force and effect set up and asserted by Lloyd, trustee, was excepted to at the time; and, in accordance with the Civil Code of Procedure of the State of Kentucky, a petition for rehearing was filed in the said Court of Appeals, and this petition for rehearing, as we have heretofore shown under the first subdivision of this brief, should have been printed in full with the extracts of the transcript of the record furnished to the court for the purpose of this motion. A decision of the Court of Appeals was rendered upon this petition for rehearing, and the opinion is found upon pp. 1, 2, 3, and 4 of the appendix to the printed extracts. It there appears that the final decision of the Court of Appeals was adverse to the claim of Lloyd, trustee, a federal question was thus clearly presented, and we claim the right to have it reviewed by this court.

THIRD.

Argument.

First.—It is evident that the first and principal point to be decided is, Does this case present a federal question?

A. It does not seem necessary to make an extended argument upon this point. The article of the federal constitution, under which we claim, the frequent decisions of this court thereon, and the principles governing this entire class of cases, are all so familiar to this court that the argument may be made very briefly.

B. The record shows (pp. 1, 2, 4, 5) that all the parties to this case were residents of the State of Ohio, that

the entire transactions took place within the limits of that state in accordance with the laws thereof; and this being so, the Ohio statutes operated as immediately and as effectively upon Otten, trustee, and upon Mathews, as upon any other of the numerous creditors of E. L. Harper.

C. The court will also observe that this case does not call into action the rule of comity, which sometimes prevails where the litigants are inhabitants of different states; for instance, if Mathews had been a resident of the State of Kentucky, she might have invoked the jurisdiction of the Kentucky courts to protect her against the assumption on the part of a foreign assignee, and have claimed that the comity which prevails between states does not require the rights of a citizen of Kentucky to be impaired by reason of any statute law of Ohio or any judicial proceedings under said law, as the jurisdiction of the Ohio courts would necessarily be bounded by the territorial limits of the state.

D. On the contrary, Lloyd, trustee, went into the State of Kentucky on an equal footing with Mathews in every respect, and stood in a position to claim all the protection, rights, and immunities and privileges which Mathews could claim. There was no reason why the Court of Appeals should ignore the Ohio law and the Ohio decisions, and give Mathews a judgment to which she was not entitled, and which she never could have obtained in the State of Ohio. There was every reason why that court should have considered the whole case under the Ohio statutes and decisions, and should have given full faith and credit to them.

E. The learned court seems to have fallen into an error, and in the opinion rendered to have made statements irreconcilable with each other.

On page 2 of the appendix to the printed extracts, the Court of Appeals said:

"The parties all resided in Ohio, and the entire transaction occurred there. Its validity therefore is to be decided by the law in force there. . . . The appellee has, in his pleading, set out a section of the Ohio statutes, which reads thus: 'All assignments in trust to a trustee or trustees made in contemplation of insolvency, with intent to prefer one or more creditors, shall inure to the equal benefit of all creditors,'" etc.

And, again, upon page 3 of the appendix, the same court says:

"The rules of the common law govern the transaction."

F. These statements appear to be contradictory to each other, but, be that as it may, the learned court proceeded to consider the claim made by Lloyd, trustee, under this section 6343 of the Revised Statutes of Ohio, and decided against the validity of the claim and against the application of the Ohio statutes, saying, on page 3 of the appendix:

"It does not appear to us, however, to embrace a case like this one, but relates alone to the preferences made in deeds of assignments to trustees for creditors generally."

This was an obvious error on the part of the Court of Appeals, and is a plain misapprehension of the statute, which refers directly to assignments made in trust to a trustee, with intent to prefer one or more creditors, and declares that such trust shall inure to the equal benefit of all creditors.

The Supreme Court of Ohio had considered this statute in a case reported in 4 Ohio State Reports, p. 602,

Harkrader et al. v. *Leiby et al.*, and we give two clauses of the syllabus:

"E, an insolvent debtor, and in contemplation of such insolvency, made a conveyance by mortgage to three persons, conditioned to be void, if he should save them harmless upon certain indorsements made by them for his benefit to divers persons, and should also pay to certain others of his creditors the certain sums of money owing by him to them. *Held:*

"1. That such conveyance is, in substance and legal effect, an assignment within the purview of the act of 1838, relating to assignments by insolvent debtors to trustees, with the design to prefer one or more creditors to the exclusion of others, and by the force of that act is made to inure to the benefit of all the creditors in proportion to their respective demands."

"5. Where such interest is received by any species of conveyance, binding the recipient, either expressly or by necessary implication, to account in chancery to any creditor of the assignor, the statute enlarges the trust and makes it inure to the benefit of *all* his creditors, and distributes the fund to all, in proportion to their respective demands."

This act of 1838, of the Ohio laws, has been already quoted in this brief, and is the same law which was set forth in full in the original pleading filed by Lloyd, trustee, and was the act in force in Ohio, on the 21st day of June, 1887, when E. L. Harper attempted to make this fraudulent preference, through the medium of a trustee, for the benefit of Mathews, and on the day when he made his general assignment for the benefit of all his creditors.

In the case at bar there was an attempt to assign, through the medium of a trustee, twenty shares of stock, and to prefer one of the creditors to the exclusion of all others. This was made in contemplation of insolvency, and the overt act of making a general assignment, followed immediately thereafter. Every element necessary to render operative and effective this provision of the Ohio stat-

ute was present, and the decisions show that the object of the statute was to reach cases like the one at bar.

Hull v. *Jeffery*, 8 Ohio, 391, 392.
Bloom v. *Noggle*, 4 Ohio St. 56, 57.
Dickson v. *Rawson*, 5 Ohio St. 224.
Williams v. *Englebrecht*, 37 Ohio St. 386.
Hitesman v. *Donnel*, 40 Ohio St. 294.

In *Dixon* v. *Rawson*, 5 O. St. 218, on p. 222 of the opinion, the court uses the following language:

To bring the case within the operation of the statute, the conveyance must be in trust, and the person receiving the property is thereby constituted a trustee for some one or more of the creditors of the debtor, to the exclusion of others. Whether it is so in trust, and the assignee or grantee such trustee, depends upon the question whether, by the terms of the instrument or by necessary implication, he is liable to account to the preferred creditor for the property in his hands, and for the manner in which he disposes of it.

If a court of chancery, at the instance of the creditor, would compel him thus to account, the character of the transfer and his own position are thereby determined; and the statute then steps in and enlarges the trust, and makes it inure to the benefit of all creditors, and distributes the fund to all in proportion to their respective demands."

G. Ignoring these decisions, and misconstruing the statute, the Court of Appeals decided adversely to the claim of Lloyd, trustee, and, later in the opinion, added these words:

"The transfer was, in fact made, it was not fraudulent, nor as a preference was it forbidden by the *lex loci*, and it must be upheld."

This denial by the court, to Lloyd, trustee, of his express rights under the Ohio statutes, raises a federal question, and justifies the issuance of the writ of error by this court.

In *Green* v. *VanBuskirk*, 5 Wallace, 307, it was held:

"The refusal of the state court, in which suit may be tried to give to the proceedings of the court, under which the property was sold, the same effect in their operation upon the title, as they have by law and usage in the state where they took place, constitutes a proper case for review in this court, under the twenty-fifth section of the Judiciary Act."

The motion to dismiss was therefore overruled, and the case was retained by this court for hearing upon the merits. The case came on for final hearing at the October term, 1868. It is reported in 7 Wallace, 139. We quote from the syllabus as follows:

"Held by this court, that by such judgment the full faith and credit required by the federal constitution had not been given in the State of New York to the judicial proceedings of the State of Illinois, and that so the judgment below was erroneous."

This opinion was delivered by Mr. Justice Davis, and was concurred in by all the members of the court. The judgment of the Supreme Court of the State of New York was reversed, and the cause was remitted to that court with instructions to enter judgment for the plaintiffs in error.

See also Sec. 1, Art. 4, of the Constitution of the United States.

In the case at bar, it is evident that the Court of Appeals could not have rendered the opinion, parts of which are above cited, unless it had passed directly upon the Ohio statutes, and that the consideration and construction of these statutes formed an essential part of the opinion rendered by the Court of Appeals. The writ of error, therefore, can not be dismissed.

Second. The deed of assignment from Harper, under which Lloyd, trustee, claims, was filed and recorded in the Probate Court of Hamilton County, Ohio, and regular judicial proceedings were had in said court, according to the statute in such case made and provided. A certified copy of this assignment and all the proceedings of the Probate Court thereunder, duly authenticated according to the act of congress for use in another state, was presented in the Chancery Court of Campbell County, Kentucky. The statutes of Ohio relating to this matter were also before the Chancery Court, and the chancellor passed upon all these records, and gave proper faith and credit to them, sustaining the validity of the proceedings in the Ohio court under the Ohio law. When Mathews appealed from the decree thus rendered in the court below to the Court of Appeals of Kentucky, the issue presented in the higher court was necessarily an issue raised upon the claim presented by Lloyd, trustee, under the proceedings of the Probate Court of Hamilton County, Ohio. He claimed in the Chancery Court, and he claimed in the Court of Appeals, that these proceedings should have the same faith and credit in Kentucky as by law and by usage they would have had if the controversy had taken place in the courts of Ohio. The refusal of the Court of Appeals of Kentucky to give these proceedings their proper force and effect was a denial of the constitutional rights of Lloyd, trustee, and entitled him to have the judgment reviewed by the Supreme Court of the United States.

In the case of *Crapo* v. *Kelley*, 16 Wallace, 610, where a question was raised as to the jurisdiction of the Supreme Court to review a decision of a New York court, it was held:

"That the New York court necessarily decided what

effect the insolvency proceedings in Massachusetts had, by the law and usage in that state, and that, as it decided against the effect which the defendant set up for them, this court has jurisdiction to review the judgment of the New York court."

See also *Cole* v. *Cunningham*, 133 U. S. 107.

The Court of Appeals of Kentucky was necessarily compelled to pass and did pass upon the question as to the effect of the insolvency proceedings in Ohio, and its decision was against the effect which Lloyd, trustee, set up and claimed for them. It has long been settled in this court, that whenever a question or issue, which makes a federal question, is so presented by the pleadings that the court must necessarily pass upon it in deciding the case, that then the federal question is raised in the case in such a manner as to justify a review by this court of the judgment of the state court.

Victory, 6 Wall. 382.

Murdock v. *The City of Memphis*, 20 Wall. 591.

In this case the court say (on p. 591):

"2. These things appearing, this court has jurisdiction, and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court.

3. If it finds that it was rightly decided, the judgment must be affirmed.

4. If it was erroneously decided, then the court must further inquire whether there is any other matter or issue adjudged by the state court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the federal question. If this be found to be the case, the judgment must be affirmed without examination into the soundness of the decision of such other matter or issue.

5. But if it be found that the issue raised by the question of federal law must control the whole case, or that there has been no decision by the state court of any other matter which is sufficient of itself to maintain the judgment, then this court will reverse that judgment, and will

either render such judgment here as the state court should have rendered, or will remand the case to that court for further proceedings, as the circumstances of the case may require."

Chouteau v. *Gibson*, 111 U. S. 220.

We are clearly entitled to have the questions on this branch of the case, and which were presented in the original pleading filed in the Chancery Court, and which were supported by proper proof in the record duly authenticated according to the act of congress, reviewed by this court.

The recent case of *Smith's Middlings Purifier Co.* v. *McGroarty*, decided in this court, and reported in 136 U. S., p. 237, reviews the Ohio statutes in regard to the filing of a voluntary assignment for the benefit of creditors, and the statutes relating to insolvency. Although one of the parties to the suit was a citizen of the state of New York, the court held (p. 241):

"The present case is to be decided by the application of the law of Ohio to the facts stated in this bill and admitted by the demurrer, and the best evidence of that law, as affecting the validity of the mortgages and assignment, is to be found in the decisions of the Supreme Court of Ohio."

We respectfully claim that the application of this principle is conclusive in favor of the plaintiff in error on the pending action.

FOURTH.

First. Coming now briefly to examine the points made by counsel for appellee, in the brief filed with the motion, let us first examine the general statutes of Kentucky and the rules of practice of her courts applicable to a case of this character. This will greatly facilitate the determination

of the question involved. See General Statutes of Kentucky, chapter 28, art. 2, sec. 10, found on page 346, as follows (referring to the Court of Appeals):

"The decisions of the court must be so written as to show the governing principle thereof, except in cases involving matters of fact only. The court must deliver written opinions in all cases."

See also, Civil Code of Practice of Kentucky, Carroll's edition, 1888, title 18, chap. 3, sec. 760, p. 341:

"Sec. 760. *The court may make rules when mandate shall issue.* 1. The Court of Appeals may make rules for the convenient dispatch of business, the preservation of order, the argument of cases and motions, and the manner and time of presenting motions or petitions for rehearing therein, and the time for issuing its mandates and decisions, and the mode of enforcing its mandates and orders, and may change the same; provided that no mandate shall issue, nor decision become final until after 30 days, including Sundays, from the day on which the decision is rendered, unless the case, in appeal cases, otherwise direct; and if said 30 days expire during the vacation or recess of the court, a written order of one of its judges filed in its clerk's office within said 30 days, shall have the same effect to suspend a mandate, by allowing a petition for rehearing to be filed, or by allowing time to file such petition, as if such order were made by the court."

Under the authority thus granted by the legislature, the Court of Appeals of Kentucky, on the 15th of March, 1884, adopted Rule 19, which is duly entered upon the record and is published annually for the information of all litigants:

"Petitions for rehearing must clearly show from the record that some question duly submitted by counsel, and decisive of the case, has been overlooked by the court, or that a decision is in conflict with a statute, or with a controlling decision, to which the attention of the court was not drawn, through neglect or inadvertence of counsel. Any

petition violative of this rule will not be presented to be filed, and if filed, will be stricken from the record."

Rule 20, adopted June 16, 1887, is as follows:

"Ordered, that where time is extended to file a petition for rehearing, and the time expires during vacation, or where the court adjourns before the time for filing a petition for rehearing has expired, the filing of the petition with the clerk in the clerk's office within the time shall be held sufficient. The clerk, however, has no right to extend the time for filing, and this can only be done by an order from one of the judges."

From the statute it appears that, in Kentucky, no decision can become final until after the expiration of thirty days from the day on which the decision is rendered; and it is further provided that no mandate shall issue during that time. No decree can be rendered by the Court of Appeals until its final decision; and the rules provide that the petition for rehearing, to be filed at any time before the decision becomes final, must clearly show from the record that some question duly submitted by counsel and decisive of the case, has been overlooked by the court.

The record in this case shows that within the proper time after the first decision by the Court of Appeals, Lloyd, trustee, filed his petition for rehearing, setting forth exactly the ground contemplated by Rule 19, and in that petition it was clearly shown that this federal question had been duly submitted in the original trial court, that it had been duly submitted by counsel in the Court of Appeals, *that it was decisive of the case*, and that *it had been overlooked by the court*.

Plaintiff in error was thus brought within the direct and explicit provisions of the Civil Code of Practice of Kentucky, and within the scope of the rules of the Court of Appeals, framed in pursuance therewith. The federal

question had been presented in the lower court, and was presented in the Appellate Court. The statement by counsel for defendant in error, in the printed brief, that the federal question was first presented in the petition for rehearing, is erroneous. But, even if it had been there first presented, it would still be in time, as no final decision and no final decree had then been rendered in the case. The entire conduct of the plaintiff in error in the Court of Appeals was perfectly regular and in strict accordance with the Code of Civil Practice of that state. If any decision in other states has been rendered in apparent conflict with this position, it has been in states where the civil practice was essentially different from that in force in the State of Kentucky.

It is probably unnecessary to cite the Kentucky decisions in support of these statements, but the following case may be examined.

A petition for a rehearing suspends the judgment of the Court of Appeals until the petition is disposed of at the same or a future term, without an express order of suspension.

Turner v. *Booker*, 2 Dana (Ky.), 335.

Second. It is said by defendants in error that the decision of the Court of Appeals was founded upon principles of general law, as administered by the courts of this country.

There is a clause in the opinion to the effect that the principles of the common law must prevail, but this statement is made only after an examination of the Ohio statutes, and after a construction had been put upon them adverse to the decisions in Ohio, and adverse to the claims made by Lloyd, trustee. In other words, the federal

question was first passed upon by the Court of Appeals, and was decided adversely to the claimant, the present plaintiff in error. This, in apparent contradiction of its previous statement, that

"The parties all resided in Ohio, and the entire transaction occurred there. Its validity is therefore to be tested by the law in force there. The deed of trust was also made there."

Later in the opinion, the court state as follows:

"The rules of the common law govern the transaction, and when so considered it is not invalid."

See pp. 2 and 3, Appendix to Extracts.

It thus appears that the principles of general law were not thought of or considered until the federal question had been previously determined.

Third. It is also said, in the brief filed by defendants in error, p. 7:

"No issue is raised in the pleading as to the correctness of the quotation from the Ohio statutes by the plaintiff in error."

The Ohio statutes were set forth in full in the pleading filed by Lloyd, trustee, in the Chancery Court of Campbell County. These statutes have been before every tribunal in which this case has hitherto been heard. They are before this court. Plaintiff in error has never waived his rights nor failed to assert them.

In the Civil Code of Practice of Kentucky, Carroll's Ed., 1888, Title 7, ch. 7, sec. 126, is found the following:

"Every material allegation of a pleading must, for the purpose of the action, be taken as true, unless specifically traversed, excepting these, which must be proved though not traversed.

1. Allegations of a petition or cross-petition against a defendant who is under any disability except coverture.

2. Allegations of an answer or reply, so far as it states a set-off or counter-claim against a new party who is under any disability except coverture.

3. Allegations against a defendant, constructively summoned, who has not appeared in the action.

4. Allegations concerning value or amount of damage, not accompanied by the allegations of an express promise, or by statements of facts showing implied promise to pay said value or damage, such allegations so accompanied need not be proved unless traversed.

Sec. 127. A material allegation is one which is necessary for the statement or support of a cause of action or defense."

It will thus be seen that when the Ohio statutes were fully set forth and pleaded *in haec verba*, and when, by the admission of opposite counsel and otherwise, it appears that no issue was made as to the existence or the force and effect of these statutes, it was not necessary to introduce proof to substantiate these averments. These were material allegations, and by the precise language of the Kentuck statute, they must, for all the purposes of the action, be taken as true. They do not fall within the scope of any of the enumerated exceptions.

The Ohio statutes were thus before the Campbell County Chancery Court, and were also before the Kentucky Court of Appeals; and, by the Code of Civil Practice, these statutes were admitted to be genuine, accurate, and complete.

FIFTH.

The only other point to be considered is the motion to affirm.

It is claimed that the writ of error in this case was filed in this court simply for delay, and that, in the lan-

guage of the brief filed by defendants in error, "it could be decided but one way when the final hearing is reached."

This last statement is probably true, but "the way" does not lie in the direction which opposite counsel seem to wish. If the case is to be considered upon its merits, we certainly desire to be heard upon the questions involved. Enough has been said in the early part of this argument to show that the decision of the Court of Appeals was erroneous, if the statutes of Ohio and the decisions of the Ohio courts are to govern the case, and this should be conclusive of this branch of the motion.

However, it would not be difficult to show that the learned court below was in error in supposing that the principles of the common law favored a preferment of one creditor by a failing debtor to the exclusion of others.

"The principles of the common law did not favor the preferment of creditors by a failing debtor. See Smith's Manual of Common Law, 381, 382."

Atkinson v. *Denby*, 7 Hurl. & Norm. 933.

Dangelsh v. *Tennent*, 2 Law Rep. Q. B. 50.

"The idea of preference of creditors was recognized as a fraud upon those not preferred."

"New devices, new forms of preferring creditors, have been found contrary to the spirit and purpose of our statutes. Can not we invoke the aid of the principles of the common law in preventing this mischief? Can not we draw from the fountain of justice, and find principles of natural justice?"

Weekly Law Bulletin (Ohio), vol. 22, p. 163.

The case of *Preston* v. *Spaulding*, 120 Ill. 208, is a leading case upon this subject. This presented a state of facts growing out of the action of the members of an insolvent firm, who, in anticipation of bankruptcy, made, within a period of less than thirty days, four conveyances of their individual estate to near relatives on alleged

debts. After these conveyances, and with full knowledge of impending failure, it was determined that the members of the firm should make a voluntary assignment, but that preferences should be given to certain creditors by executing to them what are called judgment notes. The case is very fully considered, and in the course of the opinion it is said:

"It will be observed that all this was strictly in accordance with the forms of law, but will any one deny that a most palpable fraud was, in fact, perpetrated upon appellee, Spaulding, by the debtors, or that the acts of the debtors were in fraud of the statute? . . . This voluntary assignment act is in its character remedial, and must, therefore, be liberally construed, and no insolvent debtor having in view the disposition of his estate can be permitted to defeat its operation by effecting unequal distribution of his estate by means of an assignment, and any other shift or artifice under the forms of law; and whatever obstacles might be encountered in other courts of this state, . . . a court of equity, when properly invoked, was bound to look through and beyond the form, and have regard to the substance, and, having done so, to find and declare these preferential judgments void under the statute, and to set them aside."

See also *Miner's National Bank's Appeal*, 25 Penn. St. 193, 199.

Winner v. *Hoyt*, 66 Wis. 227, 239.

Wilks v. *Walker*, 22 So. Car. 108, 111.

This Illinois case was quoted and considered at length in *White* v. *Cotzhausen*, 129 U. S. 239. In the opinion of the court, rendered by Mr. Justice Harlan, on p. 341, appears the following:

"We agree with the Supreme Court of Illinois that this statute, being remedial in its character, must be liberally construed; that is, construed 'largely and beneficially, so as to suppress the mischief and advance the remedy.' That court said, in *Chicago, etc., Railroad* v. *Dunn*, 52 Illi-

nois, 260, 263: 'The rule in construing remedial statutes, though it may be in derogation of the common law, is, that every thing is to be done in advancement of the remedy that can be done consistently with any fair construction that can be put upon it.'"

The highest court in Ohio has repeatedly declared its approval of the principle for which we contend, and has set its seal thereon in the decisions cited, which appear on p. 14 of this brief. This court has also set the seal of its approval upon the principle claimed by us in the case last cited. We have no fear that a new departure will now be taken at the request of Mathews, who, with great effrontery, asks to have the statutes of a sovereign state set aside and ignored, at her bidding; to have a premium put upon fraud and perfidy, that she may reap the reward of an unjust preference.

Respectfully submitted,

H. P. LLOYD,
C. L. RAISON, JR.

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Case No. 14,467.

Supreme Court of the United States,

OCTOBER TERM, 1891.

Term No. 1,014.

H. P. Lloyd, Assignee of E. L. Harper,
Plaintiff in Error,

vs.

Hattie A. Mathews and J. H. Otten,
Defendants in Error.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

Brief for Defendants in Error on motion to dismiss for want of jurisdiction, etc., April 25, 1892.

CHAS. H. FISK,
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Counsel for Defendants in Error.

This is a motion of defendants in error to dismiss the writ for want of jurisdiction, under rule 6 of this court. Joined with it is a motion to affirm the judgment appealed from, because the writ of error is manifestly prosecuted for delay only.

For the purposes of this motion, defendants in error have had printed all the pleadings, and the opinion and judgment of the court below, which includes the entire

record except the depositions and some minor and unimportant orders.

STATEMENT.

It appears from the pleadings and opinion, that in 1881 the defendant in error gave Mr. E. L. Harper some money to invest for her—which he did. The investments seemed to have been fortunate, for on the 8th of August, 1881, Mr. Harper gave the defendant a demand note for $5,000. Interest was paid on this note to January 1, 1882.

It appears further that Harper was the owner of some building association stock in Newport, Ky., of the value of about $5,000. On the 27th of June, 1887, he was insolvent. On the morning of that day he assigned this stock to the defendant in error, Hattie A. Mathews, in part payment of her debt. The transfer of the stock was made to J. H. Otten, with directions to collect for Miss Mathews. For this reason he was made a party, though he has no real interest.

On the afternoon of that day, Harper made an assignment of all his property to H. P. Lloyd, the plaintiff in error, under the insolvent laws of Ohio.

It appears that thereafter H. M. Healy, A. R. Bloomfield, Peter Schultz, and Albert Silva, creditors of Harper, brought suits in the Campbell Chancery Court on their several debts, and attached this building association stock. These cases were consolidated under the title of *Albert Silva* v. *Fidelity National Bank, etc., consolidated cases in equity.* In these cases, on the 16th of September, 1887, defendants filed their joint petition to be made parties defendant, and at the same term (September, 1887) they were made parties defendant. They set out in their pleading

the ownership by E. L. Harper of this building association stock, and of its transfer in a book, which was made an exhibit to the pleading; that Hattie A. Mathews was a creditor of Harper in an amount equal to the full face value of the stock; that the transfer of the stock was made some hours before the execution of the general deed of assignment of Harper; that Harper and Miss Mathews were both citizens and residents of the State of Ohio, and that by the laws of said state, insolvent debtors could make preferences in the payment of their creditors, either in the deed of assignment, or by paying them theretofore in such way as they saw proper; that Lloyd, as assignee, was claiming the said stock, and prayed that the stock be adjudged to the petitioner, Hattie A. Mathews.

On the 14th of January, 1888, Mathews and Otten filed their amended answer, in which the note before referred to is set out and filed as an exhibit. On the same day, Lloyd, assignee of Harper, filed reply to answer, and answer to cross-petition of Mathews and Otten. This is the pleading, if there be any in the case, that contains some allegations that involve a federal question, and gives this court jurisdiction. It contains five paragraphs.

The first paragraph denies that Harper owed Miss Mathews any thing at the time the stock was assigned. "He denies that, at the time of making said assignment, debtors had, by the laws of Ohio, the right to prefer their creditors in the deed of assignment." The second paragraph pleaded, *en totedem verbus*, section 4196 of the laws of Ohio. The third paragraph denies any consideration for the transfer. The fourth paragraph alleges the transfer to be fraudulent, and made with intent to hinder and delay the creditors of Harper. The fifth and last paragraph sets out section 6343 of the Ohio law in the exact

words of the statute, and alleges that under this law the transfer was void.

It will be observed that plaintiff in error nowhere denies the allegation of the original pleading of defendant in error, that "in said State of Ohio debtors had the right to make preferences in the payment of their creditors, . . . by paying them theretofore in such way as they saw proper." Plaintiff admits that insolvents in Ohio can prefer their creditors by doing so any time before the execution of the general deed of assignment.

At the May term of said court, May 7, 1888, Lloyd offered to file an amended answer and set-off and cross-petition against Mathews and Otten, to which there was an objection, and the objection sustained. In this pleading, Lloyd again denies that Harper owed Mathews any thing at the time the stock was transferred, and sets up that since his last pleading was filed he has discovered that Harper has transferred to Miss Mathews $5,000.00 of the stock of Swift's Iron and Steel Works, worth so much money, and he prays that she be required to account. At the same term (May, 1888) of the court, Hattie A. Mathews filed reply.

She admits that the transfer of the building association stock was for the purpose of preferring her to the other creditors, and denies that the Ohio law forbids it.

At the September term, 1888, on the 5th day of September, Lloyd offered to file an amended answer to cross-petition of Mathews, which was refused by the court.

At the same term, September 7, 1888, the Chancery Court rendered a judgment, giving the value of the stock, $4,914.89, to Lloyd. From this judgment Hattie A. Mathews and Otten appealed to the Court of Appeals of Kentucky, and, on the 27th of February, 1890, the Court

of Appeals rendered a judgment, reversing the judgment of the chancellor, giving the value of the stock to Hattie A. Mathews.

On a petition for rehearing being filed by Lloyd, the Court of Appeals, on the 26th of April, 1890, delivered an extended opinion, which stands as the opinion of the court, and which is found in the record.

The plaintiff in error claims that the law of Ohio, that is set out in his answer, rendered void the transfer of the building association stock, and that the state court, in finding as it did on this point, violated article 4, section 1, of the Constitution of the United States, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

This is the supposed federal question involved.

This court has said many times that, in order to give it jurisdiction to revise the judgment of a state court, the question must have been made and passed upon by the court below, and the record must show it, or the record must be in such condition as shows the court *must* have passed on the federal question, in order to arrive at the conclusion it did.

Hoyt v. *Thompson*, 1 Black, 518.

Maxwell v. *Newbold*, 18 Howard, 371.

County of Cook v. *Calumet & C. C. & Dock Co.*, 138 U. S. 635.

In the first of these cases, it was held that:

"In order to give this court the power to revise the judgment of a state court, it must appear upon the transcript, filed by the plaintiff in error, that the point on which he relies was made in the state court, and decided

against him, and that the section of the Constitution of the United States relied on was brought to the notice of the state court, and the right which he now claims here claimed under it.

"Where all of the matters put in issue by the bill and answers, and decided by the state court, were questions which depended for their decisions upon principles of law and equity, as recognized and administered in the state, and without reference to the construction or effect of any provision in the Constitution of the United States, or any act of congress, this court has no appellate power over the judgment of the state court pronounced in such a controversy."

This case, in many respects, is very like the case at bar, and the decision of Judge Taney, with a few minor changes, would be very applicable to this case.

Nowhere in the record in this case does it appear that any federal question was made by the plaintiff, directly or by implication.

The opinion of the Court of Appeals shows that the decision was founded upon principles of general law as administered by the courts of this country. The state court passed on the question of fact as to the validity of the debt of defendant in error against E. L. Harper.

The court recognized the rule that at common law an insolvent debtor could prefer a creditor, and that the common law is presumed to be the law of Ohio.

Honore v. *Hutchings*, 8 Bush, 687.

Miles v. *Collins*, 1 Met. 308.

The court held, further, that there was nothing in the statutes of Ohio, as quoted in the pleadings of plaintiff in error, that changed the common-law rule, and that the transfer by Harper to Miss Mathews of the building asso-

ciation stock in part payment of the debt was not a violation of the law of Ohio.

All these questions seem to have been decided by the state court on general principles of jurisprudence.

Beaupre v. *Noyes*, 138 U. S.

Wiggins Ferry Co. ad. *C. & A. R. R. Co.*, 119 U. S. 615.

In case of *Bridge Proprietors* v. *Hoboken L. & I. Co.*, 1 Wallace, 116, the court lays down this rule to determine its jurisdiction in this class of cases:

"But the true and rational rule is, that the court must be able to see clearly from the whole record that a certain provision of the constitution or act of congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

See also decision of Judge Catron in case of *Armstrong* v. *Treasurer of Athens Co.*, 16 Peters, 281, wherein he lays down six rules by which this court may determine its jurisdiction. This court in reviewing a judgment of a state court knows judicially only what the lower court knew. The law of Ohio in the Kentucky court must be plead and proved as any other fact.

No issue is raised in the pleadings as to the correctness of the quotation from the Ohio statutes by plaintiff in error. If the Supreme Court of Ohio had construed these statutes, the plaintiff in error should have plead and proved such construction. If then the Kentucky court had disregarded this construction, a federal question would then be presented.

Under the law this court can not look into the reports of the decisions of the Ohio courts to determine what, if any thing, they have decided as to these statutes, relied on

by plaintiff. In *Wiggins Ferry Co.* v. *C. & A. R. R.*, *supra*, this court said:

"Whenever it becomes necessary under this requirement of the constitution for a court of one state, in order to give faith and credit to a public act of another state, to ascertain what effect it has in that state, the law of that state must be proved as a fact. No court of a state is charged with knowledge of the laws of another state; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon. This court, and the other courts of the United States, exercising their original jurisdiction, take notice, without proof of the laws of the several states of the United States, but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review, is matter of fact here."

If it was necessary to prove the law of Ohio as a fact, it was necessary to plead it by proper allegations.

The statute having been plead simply, without pleading a construction of it by the Ohio Court, it remained for the state court to construe it.

It will no doubt be earnestly insisted by plaintiff in error that the validity of the Ohio statute was drawn in question, by the decision of the state court, by denying the ownership of the plaintiff in error, in the building association stock.

On this question the court in case of *County of Cook* v. *Calumet & C. C. & Dock Co.*, *supra*, said:

"The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

In case of *Texas & P. R. Co.* v. *Southern Pacific Co.*, 137 U. S. 48, the court said:

"To give jurisdiction to this court because of the denial by a state court of any title, right, privilege, or immunity claimed under the constitution or treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was specially set up or claimed at the proper time and in the proper way.

"A title, right, privilege, or immunity is not properly claimed, under the act of congress, when it is suggested for the first time in a petition for a rehearing, after judgment."

Nothing was said in this case about a federal question or about the claim of plaintiff in error, asserted by reason thereof, until the petition for rehearing was filed. The case just cited seems to be conclusive on this point. There is a reason for the rule. The party seeking the relief should present the question by proper pleading and proof, and the attention of the court should be called to it, so that it can decide the case understandingly.

It is not intended that litigants should mislead the lower court into mistakes, which it would have avoided had the question been presented in proper time.

To the same effect, see *Caldwell* v. *Texas*, 137 U. S. 691.

So we think we are authorized to find:

First. It does not appear that any federal question was made by plaintiff or decided by the court below.

Second. It does not appear that the lower court *must* have decided a federal question in order to have reached the conclusion it did.

Third. The opinion of the state court shows that the

decision was rendered on well established principles of the common law, without reference to any federal question.

II.

With the motion to dismiss is joined a motion to affirm. Conceding that this court has jurisdiction, still for obvious reasons the judgment should be affirmed.

This court will presume the proof taken was on the issue of fact made in the pleadings. Sufficient of the record has been printed to enable the court to decide this part of the motion.

The federal question, if there be one in the case, is one that the court has decided so often that it would be an injustice to the parties who are delayed to retain the case longer on the docket, as it could be decided but one way when the final hearing is reached.

Respectfully submitted,

CHAS. H. FISK,

JNO. S. DUCKER,

Counsel for Defendants in Error.

AUTHORITIES RELIED ON.

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Caldwell v. *Texas*, 137 U. S. 691.

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Supreme Court of the United States.

OCTOBER TERM, 1891.

JOHN BOYD AND EUGENE STANDLEY, ALIAS Eugene Stanton, plaintiffs in error,
vs.
THE UNITED STATES.
} Term No. 1048.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE UNITED STATES.

WM. A. MAURY,
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The plaintiffs in error were indicted for the murder of John Dansby, a citizen of the United States, on April 6, 1890, in that part of the Indian Territory over which the Choctaw Nation exercises supremacy (pp. 9, 10).

Both of the accused were found guilty of murder as charged in the first count of the indictment (p. 214).

On January 12, 1891, judgment was entered on the said verdict to the effect that the prisoner should be executed on Tuesday, April 21, 1891 (pp. 223, 224).

In the course of the trial exceptions were taken to various rulings of the court, as appears by a bill of exceptions (pp. 191–195), which begins at page 11 and concludes at page 225 of the record.

The record contains thirteen assignments of error by the plaintiff in error, Standley (pp 3–7), which his co-plaintiff in error, Boyd, prays may "be considered as his as fully as if the same had been separately filed by him" (p. 3).

ARGUMENT.

These assignments of error we will now consider in their order.

FIRST.

The first witness examined by the prosecution was objected to on the ground of incompetency, and in support of the objection a record showing the witness's conviction of the crime of larceny, and his sentence to the penitentiary on said conviction for one year on May 19, 1884, was offered in evidence by the accused (pp. 12, and 191, 192.)

To overcome the objection the counsel for the Government offered in evidence a full and unconditional pardon of the witness for the said offense, and to this evidence the defendants objected, but the objection was overruled, and the witness allowed to testify, and thereupon the defendants excepted.

There can be no doubt that the effect of the President's pardon was to remove from the grantee of it the brand of infamy that he should never be "received for a witness in any case," which was a part of his punishment, as much so as his imprisonment in the penitentiary, the term of which he had served several years before the pardon was delivered to him. Thenceforth the grantee "stood as in-

nocent as if he had never committed the offense." (*Ex parte Garland* 4 Wall., 380.)

That infamy is a part of the punishment of the offenses of which it is a consequence is shown by the case of *Commonwealth* v. *Green* (17 Mass., 575), which is approved in *Sims* v. *Sims* (75 N. Y., 469), and *National Trust Company* v. *Gleason* (77 N. Y., 410).

It is true the recital of the pardon states that the purpose of it was to restore the competency of the grantee that he might be a witness in a murder trial to take place in the United States *district court "at Little Rock"* (p. 191); but error in this mere matter of inducement can not affect the validity of the grant, which follows, of "*a full and unconditional pardon*" (p. 191). The effect of the pardon is not limited to the occasion that evoked it.

SECOND.

This assignment is based on an exception to certain testimony as to handwriting of the witness, W. B. Pape, the jailer at Fort Smith (pp. 83, 84, 192).

The letter marked D (p. 84) was exhibited to the witness, who said that *he had had occasion to see Standley's handwriting frequently.* The bill of exceptions (p. 192) states that the witness said he had never seen Standley write, but this seems to be a mistake.

But it is quite indifferent whether the witness had seen Standley write or not, for he says, réferring to the two papers or orders that were handed him with the letter, that he had paid money on them and that they were in Standley's handwriting. Now the knowledge the witness had of this handwriting was just as reliable as that which a

bank teller has of the signatures of customers of the bank whom he may have never seen write at all. And the authorities say that knowledge of handwriting derived by a servant from merely reading the superscriptions of letters of his employer put in his hands from time to time to mail is sufficient. Furthermore, there can be no doubt that a witness may be asked to testify to the handwriting of a correspondent whom he has never seen, let alone seen write. This is elementary.

If Pape had been a bank teller who had been paying Stanley's checks he would have been undoubtedly competent to prove the latter's handwriting: why, then, is he the less competent because he was, as jailor, Stanley's banker, that is to say, the custodian, probably, of what money the prisoner had, paying it out on the latter's orders?

To say that if Pape had only seen Standley write *once* he would have been a competent witness as to his handwriting, and yet that he is not such after paying order after order signed by Standley, seems absurd. As this court say, in *Rogers* v. *Ritter* (12 Wall., 317, 322), "in the varied affairs of life there are many modes in which one person can become acquainted with the handwriting of another, besides having seen him write or corresponded with him." In that case, witnesses in California were held competent to testify as to a signature with which they had become familiar only by seeing it as affixed to official acts by a Mexican official.

It is quite clear, therefore, that Pape was a competent witness, and that his testimony was properly admitted.

THIRD.

This assignment relates to the admissibility of the testimony of one F. M. Rigsby as to a robbery in which the plaintiffs in error were participants, and particularly to the admissibility of the details of said robbery.

The witness kept a small store, and, as he said, "kept the post-office," at Dora, in Crawford County.

On the evening of April 5, 1890, the day before the killing of Dansby, the prisoners, in company with a man named John Davis, who also went under the name o George Myers, went to the witness's store under the pretence of getting something to eat, and then, threatening to kill witness if he did not give them what they asked for, took his watch, some money, and a number of other things.

After the shooting the witness identified a coat and vest on the dead body of Davis, alias Myers, which he took from witness's person (p. 91), and a pair of pants, and, he thinks other clothing, too, on Boyd when he saw him in jail. About the pants the witness was certain. Indeed, he said Boyd told him he could have the pants if he wanted them (p. 91): and the watch that Standley took from witness was found on the body of Davis, alias Myers, and returned to the witness, Rigsby.

There is no question that some of this property stolen from Rigsby was found in the possession of the prisoners and on the body of their dead companion.

That the evidence of the robbery was admissible, as tending to show that the persons who robbed Rigsby were

the same as killed Dansby the next night, hardly admits of argument.

All that is necessary to constitute relevancy is that the evidence offered should have *some tendency* to prove or disprove the issue. The court, in passing upon its admissibility, has nothing whatever to do with its weight; that is for the jury. If, then, Rigsby's testimony was not relevant to the issue joined on the part of the United States, we confess our inability to determine what relevancy is.

It was not for the court to decide whether the testimony was necessary to the Government's case, if it was relevant; but, if it had been, the brief on the other side admits that evidence was needed to identify Standley (Brief, p. 5), who was not captured at the time of the homicide, and surely the evidence had some tendency to show that Dansby was killed on the night of April 6 by the same gang that robbed Rigsby.

The testimony in its details was necessary as tending to show to the jury that the three outlaws who committed the robbery were not accidentally together, but were operating as a regular band of marauders. This fact increased the probability that all three of the band took part in the killing of Dansby, and was an important link in the chain of circumstantial evidence against the prisoners.

The circumstantiality of Rigsby's testimony is an important element of its credibility, and gave the jury an opportunity to know its precise value.

The authorities supporting the ruling of the court below admitting Rigsby's testimony will be found in the opinion of the learned judge of the trial court disposing of the motion for a new trial (Record, pp. 219, 222)

FOURTH AND FIFTH.

The fourth assignment relates to the evidence for the purpose of showing that John Dansby, the deceased, was not a citizen of the Choctaw Nation, and, consequently, that cognizance of the crime of his killing was not in the courts of the Choctaw Nation.

The *status* of Dansby was proved by Jacob P. Jackson (p. 100), who described himself as "national secretary for the Choctaw Nation," and who stated that he was the custodian of the books and papers that show what colored men have registered under the law of the Nation, and that these rolls also show that Dansby had elected to leave the Nation. This witness produced the said books and papers in court.

Another witness, by the name of T. D. Ainsworth (p. 103), the objection to whose testimony is the fifth assignment of error, testified that he was chairman of the board of registration of freemen of the Choctaw Nation, and that Dansby "took money and agreed to leave the country."

The learned judge of the trial court disposes of this question as one of the grounds for the application for a new trial, in the following manner:

> What must be proven to give the court jurisdiction, and why it must be proven, is fully explained in the charge of the court in this case (see p. 196 of the record). The rolls were made according to the laws of the Choctaw Nation. The proof showed Mr. Jackson to be the secretary of the Nation, and the custodian of the rolls. They were brought from the national secretary's office; they were the original rolls, and the very best evidence of how John Dansby registered, and what his status was after his registration—that is, whether he registered to become a citizen of the Choctaw Nation, or to receive the hundred dollars pro-

vided by law to be given to the Choctaw colored men who did not desire to become citizens of the Nation. They proved that he chose to receive the hundred dollars and remain a noncitizen. There was manifestly no error on this point (p. 222).

The learned judge does not refer in his charge to the jury or in his opinion on the motion for a new trial to the law under which John Dansby abjured citizenship of the Choctaw Nation; so we refer the court to Articles 3 and 46 of the treaty of July 10, 1866 (Rev. Treaties, p. 285), and the act of Congress of March 3, 1885 (23 Stat., 366).

SIXTH.

This assignment relates to the refusal of the court to allow the witness James MacGhee (p. 147) to state what one Richard Butler said when he borrowed a gun from witness about 9:30 o'clock the night of the shooting.

It is true that Butler was at the shooting and helped to repel the attack of the prisoners and actually shot one of them.

The witness did answer the excluded question, saying that Butler said "*there was some men down to the creek, and he thought it was them robbers*" (p. 148). What "men" or what "robbers" did not transpire.

Indeed the answer, which was excluded, is without significance in the case at all, because it is quite in harmony with the theory that Butler wanted the gun for the purposes of selfdefense during the night or, even, for the purpose of assisting in making an arrest of the "robbers," and these suppositions as to Butler's intention in borrowing the gun are supported in no small degree by the fact that the accused did not put Richard Butler on the stand, *although summoned by them* (p. 193).

To say that the declaration of Butler was admissible as part of the *res gestæ* at once suggests the question, *What res gestæ?* What proceeding was on foot when the declaration was made?

Turning to the evidence of the first witnesses examined by the prosecution, Martin Byrd (p. 11) and Joe Byrd (p. 56) we find that so far from there being an attack on anybody in contemplation by Dansby and the Byrds and Butler, that night, *they were all in bed asleep and were aroused by the prisoners* hallooing from the ferry over Cache Creek, which ferry was run by Martin Byrd.

The details of the evidence of the Byrds, which plainly could not have been fabricated, shows that they thought the prisoners and their companion, Davis or Myers, wanted to cross the ferry, and the circumstances of the meeting of the two parties is not compatible with the theory that Dansby and his party responded to the call from the prisoners with any hostile purpose whatever. Indeed, it is very clear from the evidence that, so far from that, they were completely off their guard when the shooting began, giving the prisoners an advantage which nearly cost Martin Byrd his life, and which did cost Dansby his.

That they had arms is not at all remarkable for that country of disorder and desperadoes, especially, as here, when men are called from their beds at a late hour of the night at the summons of unknown people.

To have let in Butler's declaration under these circumstances would have been to introduce as hearsay what should have come through the mouth of a sworn witness.

The learned judge says in his opinion: "Richard Butler was here as a witness (Rec., p. 193) for defendants and was not called by them. If the fact was competent at all he was the proper one to prove it. As offered, it was hearsay."

If the prisoners did not wish to call Butler as their witness, after having summoned him, as the bill of exceptions informs us (p. 193), they might have asked the court at least to compel the prosecution to call him, especially if his name was on the back of the indictment, as counsel opposite says it was.

Outside of the pretension that Butler's declaration was admissible as part of the *res gestæ*, there is no conceivable ground for its admission, he not being a party to the record in any way.

SEVENTH, EIGHTH, NINTH, TENTH, ELEVENTH.

These assignments relate to the admission of testimony as to several robberies committed by Standley.

As the learned judge says in his opinion, this testimony was to meet the theory advanced by the counsel for the prisoners on opening the case to the jury, that Dansby was killed in an attempt made by him and his party to arrest the prisoners.

To overcome that line of defense the prosecution was at liberty to introduce evidence that the prisoner Standley had committed these several felonies, and that, therefore, there being probable cause for his arrest, Dansby and his party were warranted in law in arresting the prisoner, and that the killing done in resistance of the arrest was murder in all concerned.

The learned judge expounds the law on the subject of arrests by private citizens, acting without legal process, in his charge to the jury (pp. 220, 221) and in his opinion in support of his denial of a new trial.

It can not be said that the evidence of the robberies was introduced for the purpose of increasing the probability of guilt from *its tendency to show a depraved nature* in the accused, although the learned counsel for the prisoners, in his brief, takes the ground that all this part of the testimony was introduced for the purpose of helping to prove one crime by another, as in *The People* v. *Sharp* (107 N. Y., 427), relied on by the prisoners. It is unnecessary to say that the evidence in question was introduced for no such purpose.

TWELFTH.

This assignment is founded on the omission of the court to charge the jury on the subject of manslaughter, and also of the law of self-defense and of homicide in resistance to an illegal arrest.

It is sufficient to say of this assignment that it is based on *no exception taken to the judge's charge*, to which or any part thereof the prisoners made no objection whatever until after verdict, when this objection was raised in support of the motion for a new trial (p. 215).

But, upon the presentation in the record, any such directions to the jury would have been misleading and inadmissible, for the reason that there was no evidence to justify them.

As the learned judge says in his opinion on the motion for a new trial, the prisoner's counsel neither in his open-